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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 237

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

EDYTH LE GIERSE AND BANKERS TRUST COMPANY, AS EXECUTORS OF THE ESTATE OF CECILE LE GIERSE, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 12, 1940
CERTIORARI GRANTED OCTOBER 14, 1940

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1 Before United States Board of Tax Appeals

Docket No. 92103

EDYTH LE GIERSE AND BANKERS TRUST COMPANY, AS EXECUTORS OF THE ESTATE OF CECILE LE GIERSE, DECEASED

Amended Title:

ESTATE OF CECILE LE GIERSE, DECEASED, BY EDYTH LE GIERSE AND BANKERS TRUST COMPANY, EXECUTORS (SEE ORDER OF 2/5/38), PETITIONERS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearances: For Taxpayer: Fred O. McKenzie. For Comm'r: Harold F. Noneman, E. C. Hanson, Esq.

Transferred to Mr. Black 4/14/39.

1938

Jan. 26—Petition received and filed. Taxpayer notified. (Fee paid.)

Jan. 26—Copy of petition served on General Counsel.

2 Feb. 4—Motion to correct caption to read "Estate of Cecile Le Gierse, Deceased, by Edyth Le Gierse and Bankers Trust Company, Executors", filed by taxpayer.

Feb. 5—Order that caption be amended to read "Estate of Cecile Le Gierse, deceased, by Edyth Le Gierse and Bankers Trust Company, Executors", entered.

Mar. 18—Answer filed by General Counsel.

Mar. 18—Request for circuit hearing in New York, New York, filed by General Counsel.

Mar. 24—Notice issued placing proceeding on New York Calendar. Answer and request served.

Oct. 19—Motion for hearing in New York, New York, November 1938, filed by taxpayer. 10/31/38 granted for hearing week of December 5, 1938 at New York, New York.

Nov. 1—Hearing set beginning Dec. 5, 1938 in New York City.

Nov. 3—Motion for leave to file amended answer, amended answer lodged, filed by General Counsel. 11/5/38 granted. 11/7/38 copy served.

1938

Dec. 13-14—Hearing had before Mr. Disney, Div. 4, on merits. Comm'rs motion for leave to file second amended answer granted and filed at hearing. Pet's brief due 1/3/39. Commissioner's brief due 2/3/39, pet's reply 2/18/39.

3 Dec. 22—Copy of second amended answer served on taxpayer.

Dec. 28—Transcript of hearing of Dec. 13 and 14 filed.

Dec. 31—Brief filed by taxpayer. 1/3/39 copy served on General Counsel.

1939

Feb. 14—Stipulation to correct the transcript filed.

Feb. 16—Motion for leave to file the attached brief, brief lodged, filed by General Counsel. 2/17/39 granted.

Mar. 3—Motion for leave to file the attached reply brief, reply brief lodged filed by the taxpayer. 2/17/39 granted.

Mar. 4—Motion to accept the attached index page to the reply brief, filed by taxpayer. Index page lodged. 3/4/39 granted.

Mar. 4—Copy of motion and reply brief served on General Counsel.

Mar. 7—Copy of motion and index page served on General Counsel.

May 26—Motion for leave to file the attached supplemental memorandum, memorandum lodged, filed by taxpayer. 5/26/39 granted. 5/29/39 copy served on General Counsel.

May 26—Findings of fact and opinion rendered, Eugene Black, Div. 15. Decision will be entered for the petitioner.

4 May 31—Decision entered, Eugene Black, Div. 15.

Aug. 19—Petition for review by United States Circuit Court of Appeals, Second Circuit, with assignments of error filed by General Counsel.

Aug. 25—Proof of service filed by General Counsel. (3).

Oct. 11—Motion for extension of time to Dec. 17, 1939 to complete the record filed by General Counsel.

Oct. 11—Order enlarging time to Dec. 18, 1939 to prepare evidence and transmit record, entered.

Oct. 17—Praecipe for record filed by General Counsel, with proof of service thereon.

Oct. 17—Agreed statement of evidence lodged.

Oct. 18—Agreed statement of evidence approved and ordered filed.

5 Before United States Board of Tax Appeals

Docket No. 92103

[Title omitted.]

Petition

Filed Jan. 26, 1938

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (MT–ET–Cl 8012–3d N. Y.) dated December 9, 1937, and as a basis of their proceeding allege as follows:

1. The petitioner, Edyth Le Gierse, is a resident of the City, County and State of New York, and the petitioner, Bankers Trust Company, is a corporation organized and existing under the Banking Laws of the State of New York, with an office at 529 Fifth Avenue, New York, N. Y.

2. The notice of deficiency (copy of which is attached and marked Exhibit "A") was mailed to petitioners on December 9, 1937.

3. The taxes in controversy are Federal Estate Taxes claimed to be due from the estate of the above-named decedent,
6 who died a resident of the City, County and State of New York, on January 1, 1936, and the amount in dispute is $3,875.29.

4. The determination of taxes set forth in said notice of deficiency is based upon the following errors:

(a) The finding that life insurance contract #478327 in the amount of $25,000 and straight life annuity contract #20348, both issued by the Connecticut General Life Insurance Company, were one and the same transaction.

(b) The holding that the above transactions represent a transfer made to take effect at or after death in accordance with the provisions of Section 803 of the Revenue Act of 1932, which amended Section 302 (c) of the Revenue Act of 1926.

(c) The disallowance of the $40,000.00 exemption to life insurance contract #478327 in the amount of $25,000 above referred to in accordance with the provisions of Section 404 of the Revenue Act of 1934, which amended Section 302 (g) of the Revenue Act of 1926.

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a) The life insurance contract in the amount of $25,000 and the straight life annuity contract above mentioned were not one and the same transaction. They were issued on separate and dis-

tinct applications and as separate and distinct contracts, one as a single premium life insurance policy and the other as a contract to pay the decedent a monthly annuity of $49.15 for life with no remainders over.

7 (b) The Connecticut General Life Insurance Company could, would and did write a policy of insurance on the life of the decedent, on her separate application therefor, and accepted from decedent the sum of $22,946.00 in payment of a single premium thereon. Payment of $25,000 to Edyth Le Gierse, the beneficiary thereunder, is the basis of the alleged deficiency. There is no bar to any insurance company issuing such a life insurance policy to a person of the age of the decedent at the time of such issuance.

(c) The issuance of such single premium life insurance policy to the decedent is no more of a transfer made to take effect at or after death than any other ordinary life insurance policy. It is true that the policy was issued to the decedent without medical examination but the exemption allowable to life insurance under the Revenue Act of 1926, as amended, is not conditioned upon a medical examination before issuance of such insurance.

(d) The above mentioned life insurance contract issued to the decendent had all of the legal incidents of ownership which attach to any ordinary life insurance policy, including (1) the right of the insured or her estate to its economic benefits, (2) the power to change the beneficiary, (3) the power to surrender or cancel the policy, (4) the power to assign it or to revoke such assignment, (5) the power to pledge it for a loan and (6) the power to obtain from the insurer a loan against the surrender value of the policy. On the other hand, the annuity contract issued to the decedent was the ordinary straight life annuity contract for which decedent paid the sum of $4,179

8 and was to receive the sum of $49.15 per month for life with no remainders over. Such monthly payments to the decedent were based on her expectancy under the Mortality Tables in use in the State of New York and would have been exactly the same if the decedent had not applied for and received the single premium life insurance policy. Furthermore, the single premium paid by decedent for the life insurance policy in controversy was no larger or smaller because of her purchase of the straight life annuity.

6. Petitioners wish to point out that item 3 and item 4 under Schedule C–2 mentioned in the letter of deficiency have been eliminated from the controversy by reason of the waiver signed thereon by petitioners conceding that such items were subject

to a Federal Estate Tax of $1,464.15. This leaves item 1 of Schedule C–2 as the only item in controversy.

Wherefore, the petitioners pray that this Board may hear the proceedings and redetermine the proposed deficiency found by the Commissioner of Internal Revenue based on the disallowance of the ordinary insurance exemption to the proceeds of life insurance policy #478327 in the amount of $25,000 and the inclusion of such proceeds as a part of the decedent's gross estate, and further that this Board may grant to petitioners any other relief, legal or equitable, which may appear proper in the premises.

Dated January 17, 1938.

FREDERICK O. MCKENZIE,
Attorney for Petitioners,
Office & P. O. Address, 70 Pine Street,
Borough of Manhattan, City of New York.

9 *Duly sworn to by Edyth Le Gierse and Harry H. Martin; jurors omitted in printing.*

11 *Exhibit A annexed to petition*

MT–ET–C1 8012–3d New York.
Estate of Cecile Le Gierse.
Date of Death—January 1, 1936.

DEC. 9, 1937.

BANKERS TRUST COMPANY, ET AL., EXECUTORS,
529 Fifth Avenue, New York, New York.

SIRS: A deficiency of $3,875.29 in the Federal estate tax liability of the above-named estate has been determined after a review of the file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office. The determination of the deficiency and the action of this office on the protest are fully explained in the attached statement.

This notice of deficiency is given in accordance with the provisions of Section 308 (a) of the Revenue Act of 1926 as amended by Section 501 of the Revenue Act of 1934, and a petition for a redetermination of the deficiency may be filed with the United States Board of Tax Appeals within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute and forward the enclosed Form 890, waiving

the restrictions on the immediate assessment and collection of the deficiency.

The submission of the waiver will expedite the closing of this case and will also benefit the estate by preventing the accu-
12 mulation of interest charges, as the interest period terminates 30 days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the 90-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver, Form 890, has not been submitted, the deficiency will be thereafter assessed.

Respectfully.

GUY T. HELVERING,
Commissioner.

By D. S. BLISS,
Deputy Commissioner.

Enclosures:
Statement,
Waiver, Form 890.
AWW:ER.

MT-ET-C1-8012-3d New York.
Estate of Cecile Le Gierse.
Date of death—January 1, 1936.

STATEMENT

The protest arises in connection with the following items:

13 GROSS ESTATE

Insurance	Returned	Tentatively determined	Determined
Item 1	$0.00	$25,000.00	$25,000.00
Item 3	0.00	7,086.17	7,086.17
Item 4	0.00	2,576.66	2,576.66

The estate listed in the return, Form 706, under insurance two policies issued by the Connecticut General Life Insurance Company numbered 478327 naming Edyth Le Gierse as the beneficiary and numbered 20348 straight annuity for the life of the decedent payable $49.15 monthly. The policy numbered 478327 was returned at a value of $25,000.00 but was reduced by a specific

exemption of $25,000.00 to no value. Both policies were purchased at the same time and as one transaction. It is believed that the decedent was far beyond the age at which any insurance company could or would have written insurance on her life. The Bureau holds that the above transaction represents a transfer made to take effect at or after death in accordance with the provisions of section 803 of the Revenue Act of 1932, which amended section 302 (c) of the Revenue Act of 1926. It is also contended that items 3 and 4 under Schedule C–2, representing joint and survivorship annuities, should be considered as insurance. In this connection your attention is invited to the case of the Guaranty Trust Company of New York v. Commissioner, 16 B. T. A. 314, from which you will see that annuity contracts, such as these enumerated under items 1, 2, 3, and 4 are not contracts of insurance. It is held that the value of the items in question were properly included in the decedent's gross estate. Accordingly, the action taken by the Bureau in its tentative determination is affirmed.

14 The tax liability of this estate is shown by the following computation which is hereby made final:

Gross estate		$183,553.09
Deductions (1926 Act)		111,714.56
Net estate (1926 Act)		$71,838.53
Net estate (1932 Act)		$131,838.53

2—Estate of Cecile Le Gierse

Gross tax (1926 Act)		$936.77
Credit for State estate, inheritance, legacy, or succession taxes		$749.42
Net tax (1926 Act)		$187.35
Total gross taxes (1926 and 1932 Acts)		$15,012.55
Gross tax (1926 Act)		$936.77
Net additional tax		$14,075.78
Net tax (1926 Act)		$187.35
Total net tax		$14,263.13
Amount of returned tax	$8,923.00	
Amount assessed as deficiency pursuant to waiver	1,464.15	$10,387.84
Deficiency		$3,875.29

The deficiency bears interest at the rate of six percent per annum from fifteen months after the decedent's death to the date of the assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is earlier.

15 Before United States Board of Tax Appeals

Docket No. 92103

[Title omitted.]

Second amended answer

Filed Dec. 14, 1938

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for amended answer to the petition of the above-named taxpayers, admits, denies and avers as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Denies the allegations contained in paragraph 3 of the petition, except that it is admitted that the taxes in controversy are Federal Estate Taxes claimed to be due from the estate of the above-named decedent, who died a resident of the City, County and State of New York, on January 1, 1936.

4. Denies the Commissioner erred as alleged in paragraph 4 of the petition.

16 5. (a) Denies the allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) Denies the allegations contained in subparagraph (b) of paragraph 5 of the petition, except that it is admitted that payment of $25,000 to Edyth Le Gierse, the beneficiary under the policy involved, is the basis of the alleged deficiency.

(c) Denies the allegations contained in subparagraph (c) of paragraph 5 of the petition, except that it is admitted that it is true that the policy was issued to the decedent without medical examination.

(d) Denies the allegations contained in subparagraph (d) of paragraph 5 of the petition.

6. Admits the allegations contained in paragraph 6 of the petition.

7. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

8. For further and additional grounds for sustaining the Commissioner's determination in this proceeding, and as alternatives to the basis set forth in the notice of deficiency, copy of which is attached to the petition, it is averred:

(1) That the contract or contracts with the Connecticut General Life Insurance Company, which are the subject matter of the issue involved in this proceeding, were transfers of property under which the decedent retained for her life the right to the

17 income from the property and the right to designate the persons who should possess or enjoy the income therefrom; or

(2) That the decedent, at the date of her death, had an interest in the contract or contracts with the Connecticut General Life Insurance Company which are the subject matter of the issue involved in this proceeding, to the extent of $25,000.00

Wherefore it is prayed that the determination of the Commissioner be approved.

(Sgd.) J. P. WENCHEL,
E. O. H.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
E. O. HANSON,
Division Counsel,
HAROLD F. NONEMAN,
Special Attorney,
Bureau of Internal Revenue.

18 Before United States Board of Tax Appeals

Docket No. 92103

Findings of fact and opinion

Promulgated May 26, 1939

While in good health and not in contemplation of death, decedent, who was then 80 years of age, and an insurance company on December 6, 1935, entered into two separate contracts, one a single premium life insurance policy for the face amount of $25,000 and the other a single premium life annuity. The decedent was not required to take a medical examination and the company would not have issued the insurance policy without the purchase by the decedent of the annuity. Both contracts were on the regular standard form used by the company in writing life insurance and annuities, respectively. The decedent died January 1, 1936, before any payments had become due on the annuity contract, and no payments were ever made by the insurance company to anyone with respect to that contract and upon decedent's death it had no further value. Upon proof of her death, the beneficiary named in the insurance policy requested the company to retain the face value of the policy under one of the modes of settlement provisions contained therein. Held, the amount of $25,000 receiv-

able by the beneficiary represented "insurance" as that term is used in section 302 (g) of the Revenue Act of 1926, as amended, and, not being in excess of the exemption of $40,000, should not be included in the decedent's gross estate. Estate of Anna M. Keller, 39 B. T. A. (May 25, 1939), followed.

19 Frederick O. McKenzie, Esq., for the petitioners.

Harold F. Noneman, Esq., and E. C. Hanson, Esq., for the respondent.

The respondent determined a Federal estate tax deficiency in the amount of $3,875.29. The sole question is whether a certain amount of $25,000 hereinafter more fully described is includable in the decedent's gross estate under either subdivision (a), (c), or (d) of section 302 of the Revenue Act of 1926, as amended, or whether the amount is excludable under subdivision (g) thereof as representing "insurance" not in excess of $40,000 receivable by other beneficiaries.

Findings of fact

Cecile Le Gierse, a resident of New York City, hereinafter sometimes referred to as the decedent, died aged eighty years, seven months, and fifteen days, January 1, 1936, of paralysis or cerebral apoplexy, with which she had been stricken on December 24, 1935. Though she had had chronic arthritis for eight or ten years and had been taking treatment for the latter since March 1934, she had never had a paralytic stroke before, and during the last few years of her life she had suffered no other illness or disease. The disease never reached the "acute" stage as distinguished from the "chronic" stage. Her physician had not attended her from March 1935 to December 24, 1935. In March 1935 her physical condition was reasonably good, her blood pressure normal for her age, and she was very cheerful. There was no connection between the arthritis and her death. Though she was very alert, she was not able to get out of her home much, was practically confined to it for the last several years of her life by the arthritis,

20 and she participated in no outside activity. She got about in the house with a cane. She never discussed with her physician fear of death. She had a musicale at her home on the 10th of December 1935 and a dinner on the 16th of December. She was herself in attendance at both affairs and appeared to be in excellent health and in good spirits. Another musicale was planned for the 28th of December, but the invitations thereto were recalled on the 26th of December because of her illness. During the summer of 1935 the decedent had a conversation with a friend as to the necessity of moving

her residence. It had been unofficially announced that her home, the Rockingham, would be condemned and the building torn down, and she was wondering and talking about where she was going and was looking for an apartment. The building was torn down in the spring of 1936.

In the fall of 1934 she began to discuss life insurance with a friend who was an insurance agent. She was worried about her investments, which she had seen dwindle from about $100,000 to about $25,000. She had Moody's statistical service and knew a great deal about her investments and spent a great deal of time in study. She was upset about the dwindling of her investments. She asked her friend if there was anything in life insurance whereby she could conserve her principal if she sold the securities and liquidated them for their value. She subsequently liquidated the securities, realizing between $25,000 and $30,000 from them.

On December 6, 1935, the decedent executed a contract with the Connecticut General Life Insurance Co. of Hartford, Connecticut, sometimes hereinafter referred to as the company. On its face the contract was designated "Single Premium Life Annuity. Non-Participating." It was numbered 20348
21 and was on the regular standard form used by the company for writing annuity contracts. The material provisions were as follows:

"Connecticut General Life Insurance Company * * * Hereby Agrees to Pay at its Home Office in Hartford, Connecticut; to Cecile Le Gierse (hereinafter called the Annuitant) A Life Income of Forty-Nine and 15/100 Dollars Monthly, beginning on the 6th day of January 1936, provided the annuitant be then living.

"The consideration for this contract is the application, a copy of which is attached hereto and made a part of this contract, and the payment in advance of the Single Premium of $4,179.00.

* * * * *

"General Provisions.—This contract and the application therefore constitute the entire contract between the parties and all statements made in the application shall, in the absence of fraud, be deemed representations and not warranties. * * *

"Reserve.—The reserve on this contract is based on the Modified American Annuitants' Tables with interest at the rate of 3½% per annum."

The application for the contract was made by the decedent on December 6, 1935, and was headed "Application For An Annuity Contract in Connecticut General Life Insurance Company."

On the same day that the annuity contract was executed, December 6, 1935, the decedent also executed a policy or contract with the company for the face amount of $25,000 which was
22 numbered 478327 and was designated on its face as "Single Premium Life Policy—Non-Participating." The policy was on the regular standard form used by the company for writing life insurance policies, and among other things provided:

"Connecticut General Life Insurance Company * * * hereby insures the Life of Cecile Le Gierse (hereinafter called the Insured) and agrees to pay at its Home Office in Hartford, Connecticut: Twenty-Five Thousand Dollars to Edyth LeGierse, daughter of the Insured, if she survives the Insured (hereinafter called the Beneficiary), upon receipt of due proofs of the death of the Insured during the continuance of this contract. The right is reserved to the Insured to change the Beneficiary from time to time as hereinafter provided.

"The consideration for this insurance is the application, a copy of which is attached hereto, and made a part of this contract, and the payment in advance of the single premium of $22,946.00.

"This policy is issued and accepted subject to all the conditions and privileges set forth on the subsequent pages hereof, which are hereby made a part of this contract."

The "conditions and privileges" referred to in the preceding paragraph insofar as they are material to this proceeding are as follows:

"Payment of Premium.—The single premium is due and payable in advance * * *.

"This policy shall not take effect until the policy has
23 been delivered, and the single premium paid as above provided, during the lifetime and good health of the Insured.

"Nonparticipation.—This policy is not entitled to share in surplus distribution.

"Incontestability.—This policy shall be incontestable after it has been in force during the lifetime of the Insured for two years from its date of issue * * *.

"Suicide.—If within two years from the date of issue of this policy, the Insured shall die by his own hand or act, whether sane or insane, the liability of the Company shall be limited to the premium paid.

"Rights reserved to the Insured.—* * *

"Beneficiary.—* * *

"Assignment.—* * *

"Loans.—At any time during the continuance of this policy the Company will loan, upon the sole security and satisfactory assign-

ment of the policy and the execution of proper loan agreement, a sum which with interest shall not exceed the cash value at the next policy anniversary. Interest on the loan shall be at the rate of 6% per annum payable annually on each anniversary date of the policy. * * *

"Cash Value.—Upon legal surrender of the policy at its Home Office, the Company will pay a cash value of the amount set forth in the Table of Cash or Loan Values. * * *

"General Provisions.—This policy and the application therefor constitute the entire contract between the parties and all statements made in the application shall, in the absence of fraud, be deemed representations and not warranties. * * *"

24 The policy contained a "Table of Cash or Loan Values" for each $1,000 of face amount for a period of 14 years as follows:

Years:	Cash value
1	$782
2	816
3	862
4	871
5	880
6	889
7	897
8	905
9	912
10	919
11	926
12	932
13	937
14	942

The above values are based upon the American Experience Table of Mortality with interest at the rate of 3½ percent per annum.

Policy No. 478327 further provided for four different options or modes of settlement at maturity. The application for the policy was made by the decedent on December 6, 1935, and was headed "Part I of Application for Insurance in Connecticut General Life Insurance Company."

No physical examination was taken by the decedent, and the application for insurance did not answer additional questions to be answered when the applicant was a woman. The main reason given by the decedent for entering into the two contracts

25 on December 6, 1935, was her desire to preserve the principal of her estate from further shrinkage, although the estate tax situation came up in the discussion between the decedent and the life insurance agent. The decedent knew a great deal about taxes and was getting practically no income from her investment in securities. One of the reasons and one of the factors

for her action was to provide her daughter with cash to take care of estate taxes, but the primary factor was the conservation of the principal of her estate.

A regular form for proof of death was submitted and upon receipt thereof the proceeds of the life insurance in the amount of $25,000 was available to the beneficiary, Edyth Le Gierse, although upon proof of death the company was requested by the beneficiary to retain the proceeds under one of the additional modes of settlement included in the life insurance policy issued.

The company treated the two contracts as separate and issued a separate receipt to the decedent as to each, for the amount above referred to. The company maintains separate reserves for insurance and annuities. The $22,946 premium paid for the life insurance policy was credited to the insurance account and the $4,179 paid for the annuity was credited to the annuity account. The company is required to report, to the state commissioner of insurance, insurance policies issued and canceled, also annuities issued and canceled, and the two contracts were reported under the two groups, one under life insurance and one under annuities. In computing the single premium paid for the life insurance policy, no adjustment was made for the amount to be received as a premium for the annuity policy. Likewise, in computing the amount charged for the annuity policy, no adjustment was made for the single premium to be received on the insurance
26 policy. The company would not have issued the insurance policy without the annuity, considering the age of the decedent. It would have issued the annuity contract without the insurance policy.

The reason the company would not have issued the life policy without the annuity is because it involves underwriting, and the older the person is, the more difficult it is. There is, however, the possibility of a combination which can relieve that underwriting problem. Such a combination is the single premium life annuity policy and the single premium life insurance policy which were written in the instant case. The amount payable by the insured as premiums on a combination of the two contracts depends upon the age of the individual. On the average of a group of life insurance and annuity policies at the age of the decedent, the company would not pay out as principal an amount in excess of the amount of the premiums charged therefor. At the time of writing the two contracts it could be stated with almost certainty that upon decedent's death the company would pay out a maximum amount, including all amounts already paid out in pursuance of the annuity contract, less than the aggregate premiums charged for both contracts; and the $49.15 monthly payment under the annuity contract was less than the amount of the return

realized by the company on the amounts of the two premiums less expenses, taxes, and various charges in connection with the contracts.

The only way the decedent could have received any money under the life insurance policy during her life was to surrender it for its cash value or borrow on it under the terms thereof as in case of any other single premium life insurance policy of the same type.

The premium charged for the life policy was the actuarial equivalent of the rates charged people of other ages, and
27 was determined on the same actuarial basis as would have been the premium for a person of another age to whom it would have been issued without having issued an annuity contract, but it could not be accurately stated that the premium charged was the regular schedule premium because the policy would not have been issued without the issuance of an annuity contract. On an actuarial basis, in the determination of premiums, the company must go by broad averages so far as mortality, expenses, etc., are concerned, and the regulation of the premium is on the same type of broad averages as would be the case for any other ages. Insurance rates depend upon interest, mortality, and expenses. In a rate calculation, it is necessary to make a complete expense investigation, get a mortality basis to follow, and then try to anticipate what interest may be expected. The actuary must obtain the interest rate from the investment department. On a life annuity similar investigations are made with relation to interest, mortality, and expenses.

The highest age at which single premium ordinary life insurance is issued by the company without physical examination is 70 years. Group insurance would be written at any age. Physical examination is not required in certain types of life insurance policies. A person of 80 years has an expectancy under the American experience tables of about four or five years.

The decedent had no insurance on her life other than the contract with the Connecticut General Life Insurance Co.

In a statement attached to the deficiency notice the respondent advised petitioners in part as follows:

"The estate listed in the return, Form 706, under insurance two policies issued by the Connecticut General Life Insurance
28 Company numbered 478327 naming Edyth LeGierse as the beneficiary and numbered 20348 straight annuity for the life of the decedent payable $49.15 monthly. The policy numbered 478327 was returned at a value of $25,000.00, but was reduced by a specific exemption of $25,000.00 to no value. Both policies were purchased at the same time and as one transaction. It is

believed that the decedent was far beyond the age at which any insurance company could or would have written insurance on her life. The Bureau holds that the above transaction represents a transfer made to take effect at or after death in accordance with the provisions of section 803 of the Revenue Act of 1932, which amended section 302 (c) of the Revenue Act of 1926."

The amount of $25,000 which was receivable by the beneficiary named in the insurance policy numbered 478327 is not includable in the decedent's gross estate as a transfer made in contemplation of death or otherwise or as any interest in property of the decedent at the time of her death. The amount so receivable represents "insurance" as that term is used in section 302 (g) of the Revenue Act of 1926, as amended.

Opinion

BLACK: Although the facts are somewhat different, the question involved in this proceeding is the same as was recently decided by this Board in the case of Estate of Anna M. Keller, 39 B. T. A. — (May 25, 1939), and is, of course, controlled by our decision in that case.

When Mrs. Le Gierse died on January 1, 1936, she was the owner of a life insurance policy of $25,000, payable to her daughter, Edyth Le Gierse, in which policy she had
29 reserved the right to change the beneficiary. It was a regular life insurance policy, taken out by decedent upon her own life within the meaning of section 302 (g) of the Revenue Act of 1926.

As we pointed out in the Keller case, we have no cause to treat the insurance payable under the policy as anything else other than insurance, merely because decedent was required to purchase a life annuity policy at the same time she purchased the insurance policy. Although Mrs. Le Gierse was 80 years of age when she purchased the two policies, she was in good health for one of her years and had a life expectancy of between four and five years and both the life insurance premium and the annuity premium were calculated in accordance with this life expectancy.

What might be the situation if someone known to himself and to the life insurance company to be suffering from a mortal disease with only a short while to live should take out a life insurance policy together with a life annuity policy principally to get the life insurance policy for the purpose of availing to his estate the $40,000 life insurance exemption provided in section 302 (g), we do not decide. We have no such case before us.

No other beneficiaries were entitled to receive any amount as insurance under any policy taken out by the decedent upon her own life, and the $25,000, if insurance, was the only insurance

receivable by Edyth Le Gierse as the beneficiary under a policy taken out by the decedent upon her own life. We hold that the $25,000 was "insurance taken out by the decedent upon her own life", as that term is used in section 302 (g) of the Revenue Act of 1926 as amended by section 404 of the Revenue Act of 1934. Estate of Anna M. Keller, supra. It follows that the respondent erred in including the amount of $25,000 in the decedent's gross estate.

Decision will be entered for the petitioners.

30 Before United States Board of Tax Appeals,
Washington.

Docket No. 92103

Decision

Pursuant to the determination of the Board, as set forth in its report promulgated May 26, 1939, it is

Ordered and decided that there is no deficiency in estate tax.

Enter:

(S) EUGENE BLACK, *Member.*

Entered May 31, 1939.

31 In United States Circuit Court of Appeals For the Second Circuit

B. T. A. Docket No. 92103

[Title omitted.]

Petition for review and assignments of error

Filed Aug. 19, 1939

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Ralph F. Staubly, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue, appointed and holding office by virtue of the laws of the United States; that Edyth Le

Gierse, residing at 853 Seventh Avenue, New York, New York, and Bankers Trust Company, with its principal office at 529 Fifth Avenue, New York, New York, are the duly appointed, qualified and acting executors of the Estate of Cecile Le Gierse, deceased; that said Cecile Le Gierse died a resident of New York, New York, on January 1, 1936; that the Estate Tax Return, Form 706, made for the estate of the decedent, was filed with the Collector of Internal Revenue for the Third District of New York, whose office is located at 341 9th Avenue, New York, New York, which is within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit.

The Court in which the review of this proceeding is sought is the United States Circuit Court of Appeals for the Second Circuit.

II

The nature of the controversy is as follows, to wit:

The Estate Tax Return filed on behalf of decedent's estate disclosed a tax liability of $8,923.69. The decedent during her lifetime, on December 6, 1935, acquired from the Connecticut General Life Insurance Company, and there was issued to her by said company on said date, a certain contract designated a single-premium life insurance policy in the principal amount of $25,000.00, for a premium of $22,946.00, which said contract or policy was issued in conjunction with a life annuity contract for the payment of an annuity of $49.15 per month for life, at a cost of $4,179.00.

In the Estate Tax Return filed for the decedent's estate, the proceeds payable under and pursuant to the contract or insurance policy aforesaid, were included in the decedent's gross
33 estate for the purpose of the tax, as insurance or insurance proceeds payable to the beneficiary named in said contract or policy. The estate claimed an exclusion or exemption of $40,000.00 with respect to said proceeds, pursuant to the provisions of Section 302 (g) of the Revenue Act of 1926, upon the theory that such monies constituted insurance within the purview of said section of the statute aforesaid.

Under date of December 9, 1937 the Commissioner of Internal Revenue mailed a notice to the executors aforesaid, asserting a deficiency in estate tax in the amount of $3,875.29. In determining the deficiency the Commissioner disallowed the exemption claimed with respect to the proceeds paid to the beneficiary named in said contract or policy of insurance and included said proceeds in the decedent's gross estate as the subject of a transfer made in contemplation of and intended to take effect in possession or enjoyment at or after the decedent's death,

pursuant to the provisions of Section 302 (c) of the Revenue Act of 1926.

Under date of January 26, 1938 the executors aforesaid filed a petition with the United States Board of Tax Appeals for a redetermination of the deficiency in the estate tax, as determined by the Commissioner. After the answer of the Commissioner was duly filed, the case was submitted to the Board for decision. The Memorandum Findings of Fact and Opinion of the Board was entered May 26, 1939 and the final order of the Board, redetermining the deficiency, was entered May 31, 1939, wherein it was ordered and decided that there is no deficiency in estate tax.

The Board of Tax Appeals held that the proceeds paid to the beneficiary named in said contract or policy of insurance constituted insurance payable to a specific beneficiary within the purview of Section 302 (g) of the statute aforesaid, and that the estate was therefore entitled to the exemption of $40,000.00 with respect thereto.

34 III

The Commissioner of Internal Revenue being aggrieved by the conclusions of law contained in the decision of the Board of Tax Appeals and by its order of redetermination, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Second Circuit.

The Commissioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in holding and deciding and finding as a fact that the so-called single-premium life insurance policy issued in conjunction with the life annuity contract, is a life insurance policy within the purview of Section 302 (g) of the taxing statute; there being no substantial evidence to support such finding of fact.

2. The Board of Tax Appeals erred in not holding and deciding and finding as a fact that the so-called single-premium life insurance policy issued in conjunction with the life annuity contract, was not a policy of life insurance within the purview of the statute, as established by the facts adduced.

3. The Board of Tax Appeals erred in not holding and deciding that the disposition made by the decedent of the proceeds arising out of the so-called life insurance policy constituted a transfer in contemplation of and intended to take effect in possession or enjoyment at or after the decedent's death.

4. The Board of Tax Appeals erred in that its decision is not supported by the evidence and is contrary to law.

35 5. The Board of Tax Appeals erred in entering its final order of redetermination that there is no deficiency in estate tax.

6. The Board of Tax Appeals erred in failing and refusing to enter its final order of redetermination that there is a deficiency in the estate tax in the amount of $3,875.29, as determined by the Commissioner, instead of no deficiency.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd.) SAMUEL O. CLARK, JR.,
R.
Assistant Attorney General.

Signed J. P. WENCHEL,
(Sgd.) J. P. Wenchel,
R.
(Sgd.) J. P. Wenchel.
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
RALPH F. STAUBLY,
Special Attorney,
Bureau of Internal Revenue.
RFS-spt 8-18-39.

36 [*Duly sworn to by Ralph F. Staubly; jurat omitted in printing.*]

37 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 92103

Notice of filing petition for review

Filed Aug. 25, 1939

To BANKERS TRUST COMPANY, *Executor of the Estate of Cecile Le Gierse, decd.*
529 Fifth Avenue, New York, N. Y.

You are hereby notified that the Commissioner of Internal Revenue did, on the 19th day of August 1939, file with the Clerk

of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 19th day of August 1939.

38 (signed) J. P. WENCHEL,
R.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 21 day of August 1939.

BANKERS TRUST COMPANY,
as Executor.
W/W CECILE LE GIERSE.
Respondent on Review.
ROBERT E. GUNNELL,
39 SPT 8-18-39. *Asst. Trust Officer.*

In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 92103

Notice of filing petition for review

Filed Aug. 25, 1939

To: FREDERICK Q. MCKENZIE, Esq.,
70 Pine Street, New York, N. Y.

You are hereby notified that the Commissioner of Internal Revenue did, on the 19th day of August, 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 19th day of August 1939.

40 Signed J. P. WENCHEL,
R.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 21 day of August 1939.

FREDERICK O. MCKENZIE,
Attorney for Respondents on Review.

SPT. 8-18-39.

41 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 92103

Notice of filing petition for review

Filed Aug. 25, 1939

To EDYTH LE GIERSE,
Executor of the Estate of Cecile Le Gierse, dec'd.
853 Seventh Avenue, New York, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 19th day of August 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 19th day of August 1939.

42 Signed J. P. WENCHEL,
R.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 22 day of August 1939.

(S) EDYTH LE GEIRSE,
Respondent on Review,
by FREDERICK O. MCKENZIE,
Attorney under power of attorney dated June 8 1937 on file in Office of Treasury Department.

Spt. 8-18-39.

43 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 92103

Statement of evidence

Filed Oct. 18, 1939

The following is a statement of evidence in narrative form in the above-entitled cause. This cause came on for hearing before the Honorable R. L. Disney, Member of the United States Board of Tax Appeals, on December 13, 1938, at New York, New York. Frederick O. McKenzie, Esq., appeared for the petitioners (respondents on review) and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, by Harold F. Noneman, Esq., appeared for the Commissioner of Internal Revenue.

Thereupon, Dr. Ralph Knowles, called as a witness on behalf of the petitioners (respondents on review), having been first duly sworn, testified as follows:

DIRECT EXAMINATION

My name is Dr. Ralph Knowles. I live at 160 Wadsworth Avenue, New York City. I am admitted to practice medicine in the State of New York and have been practicing since 1907. I attended the deceased, Cecile Le Gierse. In the last few years of her life I probably attended her forty times—

44 from March in 1934 to the time of her death. In the first part of that time I did see her on an average I should say once every week because she was taking treatment for arthritis. During the last few years of her life she suffered none whatever from any particular serious illness or disease. The arthritis which I mentioned was quite similar to that which you find in a person of her age. I was called to attend her on December 24, 1935. She was laying on the floor paralyzed on one side completely, her hand and foot, and her face on the opposite side. The cause of that condition was a paralytic stroke, cerebral apoplexy. She had positively not ever suffered a stroke of that kind before, or of any kind. I saw her after December 24, 1935—saw her every day. She died on January 1, 1936. The actual cause of her death was cerebral apoplexy. She had no second stroke. Prior to December 24, 1935, the last time I had seen her was March of that same year—1935. Her physical condition at that time was reasonably good. She had a blood pressure of 170 systolic and 190 diastolic. That is quite

normal for a person of her age. She was in a very cheerful mood at that time. At that time, from my examination of the deceased, I had no reason at all to believe her death was imminent. From my examination of her on that date and from my knowledge of her prior physical condition, I would have considered it possible or probably that she might have lived two or three years. I do not think there was any connection between the arthritis which she had and the ultimate cause of her death.

"Q. Doctor, on the last page of the Federal Estate Tax Return this question is asked: 'Length of last illness of the deceased.' And the answer given: 'Two years.' In your opinion is that a correct answer?—A. No, it is not.

45 "Q. On a prior page on the return under Schedule H: 'Expense of last illness.' One item appears: 'Dr. Ralph Knowles, 160 Wadsworth Avenue, New York, New York, $100.' Is that figure correct?—A. Correct for the last illness; yes.

"Q. What period did that cover?—A. That covered the treatment for the last eight days of her illness.

"Q. In other words, from December 24 to January 1?—A. To January 1."

CROSS EXAMINATION

The last time I saw Mrs. LeGierse prior to her last illness was in March of that same year—rather March of 1935. She died in January, so that would make it the previous year. During that time I had no knowledge of any life insurance or annuity policies which were taken out. I knew nothing of them or anything of that sort. Due to illness, Mrs. LeGierse was practically confined to the home for the last several years of her life. Her illness did not permit her to get out much. She did not participate in any outside activity that I know of. I was never a visitor on a social basis to her home, other than professional capacity, except that I did talk to her after the visit. We sat and talked.

Examination by BOARD MEMBER.

Her age was eighty, if I remember correctly. She did not have any other than myself attending her during the last few months between March and the date of her death, because she telephoned me from time to time wanting to know whether she should take some of this medicine or that medicine and so forth. I believe she called me on an average of once a month during that time.

46 I did not prescribe to her over the phone, I would just tell her to take the medicine that had already been left for her. I treated her for arthritis. Acute arthritis does affect the heart, but chronic arthritis very rarely has any bad effect on the

heart. She had chronic arthritis. I might say she suffered from it in some degree for eight or ten years. She was able to get around within the house. She walked with a cane. There is no connection between cerebral apoplexy and the heart condition. I have no idea what caused the cerebral stroke to kill. I found it happened quite late at night on Christmas Eve. They called me in from the country: I was out at my country place.

"The MEMBER. What was the previous condition?

The WITNESS. Well, ordinarily it is connected with high blood pressure or something of that sort because it is a rupture of the vessel. Usually the vessel that does rupture is the lenticular striate artery running from one brain to another that produces an enlargening and causes the rupture of the vessel.

"The MEMBER. It is an explosion or eruption?

"The WITNESS. An eruption; yes.

"The MEMBER. Of the vein?

"The WITNESS. Yes.

"The MEMBER. Is it true to say that is necessarily the result of high blood pressure and——

"The WITNESS. No. There are many other things. Endarteritis obliterans—maturity may make a vessel close—and it is sometimes given rise in younger people—and anything that raises the pressure, sometimes sudden fright. She might have had sudden fright when she went to the toilet, something of that sort, and it ran her blood pressure suddenly up and caused it to explode.

47 "The MEMBER. Did she ever talk to you about fear of death?

"The WITNESS. No; not at all.

"The MEMBER. That is all."

Thereupon, Mr. J. B. JOHNSTON, called as a witness on behalf of the petitioners (respondent on review), having been first duly sworn, testified as follows:

DIRECT EXAMINATION

I live at 320 Riverside Drive. My business is selling life insurance. I sold the two contracts in question to the deceased. Those two contracts which you show me are the two I sold the deceased.

Thereupon there was offered and received in evidence on behalf of the petitioners (respondents on review), in lieu of the original, as Petitioner's Exhibit 1, a photostatic copy of the life insurance policy, No. 478327, issued by the Connecticut General Life Insurance Company of Hartford, Connecticut, to Cecile LeGierse, the insured, by which it was shown that such

policy was issued to the insured at the stated age of eighty-one years in the principal amount of $25,000.00, upon the advanced payment of a single premium of $22,946.00; that said policy was issued under date of December 6, 1935; that attached thereto and made a part thereof is a copy of the application for the issuance of said policy executed by the insured under date of December 6, 1935; that the policy was made payable to a specific beneficiary other than the decedent's estate; that the policy possessed a cash surrender or loan value of $782.00 per thousand upon the expiration of the first year, with increasing amounts for succeeding years; that the policy was nonparticipating
48 and was not entitled to share in surplus distribution; and that the insured reserved the right to change the beneficiary:

Thereupon there was offered and received in evidence on behalf of the petitioners (respondents on review) and in lieu of the original thereof, as Petitioners' Exhibit 2, a photostatic copy of the annuity contract, No. 20348, issued by the Connecticut General Life Insurance Company of Hartford, Connecticut, to Cecile LeGierse, as the annuitant, by which it was shown that said contract was issued to the insured upon the stated age of eighty and six-twelfths years, providing for the payment of an annuity of $49.15 per month for life, upon the advanced payment of a single premium of $4,179.00; that said contract was issued under date of December 6, 1935; that attached thereto and made a part thereof is a photostatic copy of the application for the issuance of said contract executed by the annuitant under date of December 6, 1935; and that said contract was non-participating and not entitled to share in surplus distributed.

I knew the deceased approximately four years before her death. A mutual friend of ours took me to her home to a musical. That mutual friend was a social acquaintance. Thereafter, I saw her on an average of once a month. Usually I was there on a social call; often times at her home for dinner. At other times I was there to these musicals that were had at her home quite often. I did discuss business matters with her besides the question of life insurance. Not at first, not in the first two years that I knew her, but along in the summer and fall of 1934 and from that time on until her death I did.

"Q. When did you say the subject of life insurance was first mentioned?—A. Well, she brought the subject of life insurance out in the discussion in the fall of 1934.

49 "Q. And under what circumstances?—A. Well, Mrs. LeGierse was very alert and she spent a great deal of time in study. She had all the Moody's statistics, Moody's service, and she knew a great deal about her investments, and our discus-

sion started from that period, and she was very much worried the last—let's see, the fall of 1935 she had $100,000 of securities that she had watched dwindle down to about $25,000. She was very much upset about that and as to the principals, that was her main worry. And in turn life insurance came up as a matter of—she asked me if there was any way of conserving her short principal through life insurance, and, too, her income was very small from this $100,000 of securities.

"Q. You mean it was worth $100,000 at that time?—A. No. I would say the last three or four years it had gradually dwindled and would have been worth not more than between twenty-five and thirty thousand dollars.

"Q. And did she state to you she wished to convert these securities into insurance, is that what you mean?—A. Well, the way it came about, we were talking. She asked me in our discussion—naturally insurance came up—and she asked me was there anything in life insurance whereby she could conserve her principal if she sold the securities and liquidated them for their then value which was, as I say, between twenty-five and thirty thousand dollars.

"Q. Did she subsequently to the best of your knowledge liquidate those securities?—A. She did. That is where this money was invested.

"Q. Do you recall what she realized from them approximately?—A. It was approximately between twenty-five and thirty thousand dollars."

50 The total amount invested in the two contracts was approximately $27,500.00. To the best of my knowledge that is about what she realized from the securities that she sold. She gave as the main reason for purchasing these contracts the desire to conserve the principal so that there would be no further shrinkage in this particular part of her estate.

I am what is known as a Certified Life Underwriter. That is the decree given by the College of American Life Underwriters. It requires twenty-hour examination. There are about one thousand life insurance agents in America today who have this designation. It designates that you have a very good knowledge of all types of life insurance and annuities issued by the Standard Insurance Companies in this country. I am familiar with the provisions in the Standard Life Insurance policies and annuities. A single-premium life insurance policy ordinarily has the same provisions as any other life insurance policy with the exception of the premium payments. This particular life insurance policy, Petitioner's Exhibit 1, has the usual provisions of the single-premium life insurance policies issued by the Standard Companies. The insured had the right to have the beneficiaries under

that policy changed; to surrender the policy for its cash surrender; to obtain a loan and to pledge this policy as collateral. It had the usual incontestability clause.

"Q. In other words it contained all the provisions of an ordinary life insurance policy of that nature?"

Thereupon objection was interposed to the above question, which objection was sustained and an exception noted.

"Q. Now as to the annuity which the deceased purchased through you, I ask you if it is the ordinary type of life annuity as issued by the Standard Companies?"

51 Thereupon objection was interposed to the above question, which objection was sustained and an exception noted.

"Q. Mr. Johnston, you are familiar with those provisions for both of those contracts?—A. Yes; I am.

"Q. Could the deceased assign her right to receive annuity payments without assigning the life insurance policy?—A. Yes, sir."

Thereupon counsel for respondent moved to strike the question and answer last above referred to, which said motion was sustained and an exception was allowed petitioners.

After the issuance of these policies by my company, I saw Mrs. Le Gierse, the deceased, in about a week—I saw a great deal of her during the month of December. These were issued around the 10th at a party at her home. I saw her and then I saw her again. I had dinner at their house the 16th of December. The occasion on the 10th of December was a musical. Quite a lot of people were there. Mrs. Le Gierse was in attendance herself. As far as I could see, she appeared to be in excellent health. On the 16th of December the occasion was dinner at her home. She seemed then to be in good health and in very good spirits. There was another party planned the latter part of the month, on the 28th. That party was to be another musical—a form of a tea in which people sing and usually she had fifty to seventy-five people there. She was in attendance at these parties. That invitation was recalled on the 26th, I think two days before the party was scheduled—recalled in writing, on account of illness. I first learned of her death on January 1, 1936, the day she died. During the summer of 1935, I had a conversation with Mrs. Le Gierse relative to the possibility of her moving her residence. Their home, the Rockingham, it

52 had not been announced officially but unofficially it would be condemned, the building torn down, and there were quite a lot of talks about that all throughout the building. All the tenants were talking about it and she especially. And she was

wondering, talking about where she was going, looking for a new apartment. They thought they would have to move at the end of the year or the first of the next, they were not sure. It had not been officially announced. That came late in the fall, along in November. They were told they would have to move sometime the first part of the next year, 1936. The first conversation I had with her on this subject was in the summer of 1935. At that time she was discussing plans with me for moving her apartment approximately six months thereafter. That building which was 216 West Fifty-sixth Street, was torn down in the spring of 1936. I saw them tear it down—I passed the building.

CROSS EXAMINATION

I recall recently an Internal Revenue man, Mr. Justin, calling upon me to discuss this matter. I had quite a long talk with him.

"Q. Did you inform him that the decedent was particularly interested in augmenting her income by taking out these policies?—A. That was a factor; yes.

"Q. Was that one of the reasons, to provide the daughter with cash to take care of the estate taxes upon her death?—A. All that came into the discussion. That was one of the factors. I would say the primary factor of this whole thing was conserving the principal because she had above one hundred thousand that had fallen down to $27,000. I would say the primary factor in the matter was that. The estate tax situation came up.

53 "Q. The Estate Tax situation came up, one of the situations that came up?—A. She knew a great deal about taxes and these investments and her income—she was getting practically no income for the securities she had.

"Q. The only thing I am driving at now I am trying to get whether or not this statement was true that one of the reasons was to provide her daughter with cash to take care of the estate taxes.—A. That was one of the factors; yes."

Thereupon, Mr. AUBREY L. JOYCE, called as a witness on behalf of the petitioners (respondents on review), having been first duly sworn, testified as follows:

DIRECT EXAMINATION

I live in West Hartford, Connecticut. I am employed by the Connecticut General Life Insurance Company. I have been employed by them for a little over eleven years. I am superintendent of the Actuarial Department. In connection with my

duties as an actuary, I think I am familiar with practically all types of annuities and life insurance policies that is issued. I am familiar with the principles of computation used to fix premium rates on all life insurance policies and annuities issued by my company. The determination of a life insurance premium, while it is complicated, can be probably simplified by saying this: That all the rates depend upon interest, mortality, and expenses. Now in a rate calculation it is necessary to go to the work or effort of making a complete expense investigation, get a mortality basis to follow and then try to anticipate what interest may be expected. Of course the actuary does not try to determine the interest rate. He must obtain that from the knowledge of the investment department. If you are attempting to
54 calculate the non-participating premium, you will use expense factors, mortality factors, which are very close to the rate you actually expect. In other words, you have very little margin for safety on it. The interest factor, you will drop below the rate you expect will be earned in the future. Rather you drop slightly below but just about it for the amount of money you expect. Now when you come to the participating rate, there being a margin of safety of course that any overpayment made in the participating premium will presumably be returned to the policyholder in the form of dividend. That is briefly how you calculate premium rates. Of course the thing itself is complicated and would take a long time.

On a life annuity you would have to go through similar investigations with relation to interest, mortality, and expense. Of course the mortality aspect would broaden according to the type of investment you put into the insurance. I have examined the two contracts in this case and the applications therefor.

"Q. As an actuary do you regard them as one transaction or two separate and distinct transactions?—A. In so far as the Connecticut General is concerned, we treat it as two different contracts: One a life insurance contract, and one an annuity contract."

A receipt was issued to Mrs. LeGierse by my company for each contract. The copy of receipt for life insurance policy No. 478,327 which you show me was prepared by me from my company's records. We prepared this copy from our company's records. The only thing missing on this receipt which would have ap-
peared on the receipt which Mrs. LeGierse received has to
55 do with the received payment date, which is the date filled in by the New York office the day they receive payment and return the receipt to her, and the counter signature which was put on by our New York office and signed by the cashier of that

office. Otherwise it is the same receipt. The same remarks hold with regard to the received date on the copy of receipt of the annuity No. 20348 which you show me, I prepared that receipt from my company's records.

Thereupon there was offered and received in evidence on behalf of the petitioners (respondents on review) and in lieu of the originals thereof, as Petitioners' Exhibits 3 and 4, photostatic copies of the two receipts issued by the Connecticut General Life Insurance Company of Hartford, Connecticut, evidencing the payments of the premiums paid for the insurance policy and annuity contract, by which it was shown that separate receipts were issued with respect to the payment of said premiums.

"Q. Mr. Joyce, was a single premium paid for this policy fixed on the same basis described by you for all single life insurance policies—single premium life insurance policies issued by your company?—A. The single premium charged—I am now speaking from the company's angle—the premium which we charge for each of those contracts was in accordance with regular schedule of rates.

"Q. That you described a few minutes ago?—A. That I described a few minutes ago; yes.

"Q. In computing the single premium on the life insurance policy was any allowance made for the amount to be received on the annuity?—A. No.

"Q. And in computing the amount charged for the annuity was any allowance made for the premium to be received for the life insurance policy?—A. No. I would like to make a reservation. I am not sure I understand your two questions.

(Questions repeated and witness answered "No" to both.)

"Q. Is it true that the single premium paid by the applicant for an insurance policy would have been the same whether or not the annuity had been issued?—A. The only answer I can say to that question is that we would not have issued the policy without the annuity at that age.

"Q. I am speaking of the premium. You have testified you took—you did not take into consideration the amount to be received on the annuity in computing the premium?—A. That is right.

"Q. So that if—we will just presume if your company would have issued the life insurance policy the premium would have been the same.—A. That is right.

"Q. You are saying this, that the premium charged for the life insurance policy was the actuarial equivalent of the rates charged other ages?—A. That is right."

Our company maintains separate reserves for insurance and annuities. In this case the $22,940.00 paid for the life insurance policy went to our insurance account. The $4,179.00 paid for the annuity went to the annuity account. We do not have to report life insurance receipts and annuities to the Commissioner of Insurance of the State of Connecticut, but you have to make a report of insurance policies issued and cancelled and also annuities issued and cancelled. These two contracts were reported
57 as the individual contracts were issued, under those two groups, one life insurance and one under annuities. Our company has a regular form for proof of death and one was submitted in this case. I have examined it.

Thereupon there was offered and received in evidence on behalf of the petitioners (respondents on review), in lieu of the original, as Petitioners' Exhibit 5, a photostatic copy of the proof of death filed with the Connecticut General Life Insurance Company of Hartford, Connecticut, pursuant to the provisions of the life insurance contract No. 478327, by which it was shown that such proof of death was made upon the regular form in use for that purpose by the insurance company in the collection and payment of insurance claims under policies of insurance issued by the company.

Upon receipt of proof of death we were requested to retain the proceeds under one of the additional modes of settlement which was included in the life insurance policy we issued. The proceeds were available to the beneficiary named in the life insurance policy, Edythe LeGierse, at any time. It was her request that caused us to retain them.

"Q. How much was available to her? The full amount of the policy?—A. That was the amount of the life insurance policy, $25,000.

"Q. Now was this paid to her by your company as life insurance proceeds of that policy?—A. That policy entitled life insurance policy.

"Q. Under the terms of this life insurance policy was any income or participation benefit payable to the insured?—A. No, this life insurance contract is a nonparticipating contract."
58 The only way she could receive any money under this contract during her life was to surrender it for its cash value or else borrow on it under the terms of the contract, as in any other single-premium life insurance policy of the same type. Under the charter of our company we are permitted to issue life insurance and personal accident, health insurance.

"Q. And annuities?—A. I am sorry I cannot answer beyond those.

"Q. You issued an annuity?—A. We issue an annuity. Whether or not life insurance covers it or not, I do not know. I do not know whether it is broad enough to cover annuities or not."

This contract which I have identified as having examined, Petitioners' Exhibit 1, is a single-premium life insurance contract. It is not a health policy and it is not an accident policy.

CROSS EXAMINATION

The decedent in this case received no physical examination in connection with either contract. It is a fact that my company would not have issued the life insurance contract to the decedent at her then age without issuing at the same time an annuity contract. When I stated that the Connecticut General treats these as separate contracts, I meant from an actuarial standpoint. As far as I am concerned and as far as my knowledge of it goes, I treat them from an actuarial standpoint.

"Q. And you stated that the premium was at the regular
59 scheduled rates. And I do not know whether I understand you, but is this a correct statement: That the premium which is allocated or stated in this Exhibit No. 1 to be the premium for that policy, that being what purports to be the life insurance contract, that premium was determined on the same actuarial basis as would have been the premium for a person of another age to whom you would have issued it without having issued an annuity contract?—A. That is right.

"Q. Is that what you meant when you so stated?—A. In other words, on an actuarial basis in the determination of premiums you would have to go by broad averages so far as mortality, expense, and so forth are concerned; and the calculation of this premium is on the same type of broad averages as would be the case for any other ages.

"Q. But it could not be accurately stated this is the regularly scheduled premium for this policy because you qualify that by saying this policy would not have been issued without the issuance of an annuity contract?—A. That is right.

"Q. Now the reason—I do not know this and I want you to tell me if I make a mistake. You correct me. The reason why the company would not have issued such a policy without the issuance of an annuity policy is because of the advanced age of the decedent and her condition, was it not?—A. I think that involves something I cannot make quite a direct answer to.

"Q. Isn't it that you cannot secure an average as a risk on it, isn't that the real reason?—A. No; that involves underwriting. In underwriting, the object of underwriting is to try to put all people in a broad average as you say.

60 "Q. And you cannot do it with a person that old?—A. The older you get, the more difficult it is to bring them in. That is, as far as underwriting a contract in itself. There is, however, the possibility of a combination which can relieve that underwriting problem as you normally think of it.

"Q. Now I want to ask you this question: The aggregate amount paid on these policies that are required as premiums—and I am guessing, I do not have it but—Well, I will put it this way: The aggregate amount paid as premiums for these policies was an amount—I am talking now, when I said these policies I mean these two pieces of paper, the originals of these two pieces of paper, put it that way—was an amount of such an extent that combined the Connecticut General Life Insurance Company assumed no insurance risk and paid under that document which is characterized—well, it states it will pay life income, we will call it an annuity contract or annuity document—the amount payable under that document as a monthly income was less than the amount of the income of the Connecticut General Life Insurance Company—the amount the Connecticut General Life Insurance Company expected to receive upon the combined premiums. That may be a long question.—A. Your question is saying to me that on any contract we issue all we guarantee on those contracts is a certain insurance rate which is below the rate we expect to earn on the investment. That is true of any company.

"Q. I will put it this way: Assuming that you determined what you expected to earn on your investments, the amount paid for the combination of these two policies was such that the
61 company assumed no insurance risk whatsoever. That is a fact, is it not? They would not have had to pay out as much as they got in if my prior assumption is correct?—A. I do not want to say it is wrong but it is not entirely correct because the amount we would pay to an individual on a combination of these two contracts depended on the age of the individual. As in this case we paid $49 and something. In other words, for some other age we might have paid something more than that, and on another age something less.

"Q. And the premiums might have been less likewise?—A. And a total premium of $27,125 for $25,000 insurance.

"Q. I will get at it this way: You were to pay $49.15 monthly, were you not?—A. I am not sure that it is correct.

"Q. You were to pay $49.15 monthly. You computed the premiums which were allocated to these policies on a basis using an interest rate to be received by the company, an expected rate which was greater than that $49.15, did you not?—A. Well, obviously we must have. From the general assumption under rates

where you do not guarantee an interest return which will come up to the interest you expect as a maximum to earn.

"Q. I do not know whether I am using insurance language. The insurance company has two kinds of risks in its business. One is an insurance risk and the other is an investment risk. Have I used terms having meaning to you?—A. Yes; you have.

"Q. These two contracts refer to the Connecticut General Life Insurance Company—they represent to them solely an investment risk and not an insurance risk together.—A. To that general qualification I might say that the amount we pay as income depends upon the insured's age.

62 "Q. But other than that, these policies, these precise documents——A. Yes.

"Q. Those two things together represent to the Connecticut General Life Insurance Company solely an investment risk and not an insurance risk?—A. No. I cannot say that is entirely true because of the modification due to the change of rate depending upon the person's age. I cannot say it is entirely true.

"Q. I will start all over again. How much did you get in premiums on these two policies?—A. $27,125.

"Q. Now, included in that is a certain expense item which I believe you ordinarily characterize as loading charge?—A. That is right.

"Q. Do you know what the loading charge was on these two contracts? It was less than $2,000 in any event, was it not?—A. Our loading charge was made up of two things; one was the loading charge which was in accordance with the regular schedule of annuity rates which were on the same basis, loaded with the percentage. That was the annuity contract.

"Q. Yes.—A. The other loading was in accordance with our actuarial equivalent rates working on insurance mortality table and insurance and expense assumption.

"Q. Now I am asking you again: Do you know—can you tell me? Maybe you cannot tell me?—A. I cannot tell you offhand, no.

"Q. You cannot tell what the loading charge was?—A. I cannot tell what the loading was in that premium. I can find out what it was. I will admit that I can find out but I do not know offhand.

"Q. Would the Connecticut General Life Insurance Company under these two documents pay out as principal and not as
63 monthly income an amount in excess of the amount received from this decedent by the Connecticut General Life Insurance Company?—A. On the average we would not; no.

"Q. I am not talking about the average. I am talking about this policy?—A. Everything we do is based on averages, so I can only speak to you on the average because, as you say, individual

cases differing from the average might have been one way or another.

"Q. On the average if you had a group of policies at about this age, you would not——A. That is right.

"Q. Pay out more than the single premium?—A. Yes.

"Q. Maybe we got somewheres. But what I want to know; you got $27,000, didn't you, twenty-seven thousand and something dollars?—A. Yes.

"Q. You are going to pay out as principal a maximum of twenty-five thousand?—A. That is right.

"Q. $25,000 is less than $27,000, that is right, isn't it?—A. Yes.

"Q. Now, having got that far, will the company pay out as principal on the combination of these two policies anything in excess of what it got from the decedent to this decedent's estate or duly designated beneficiary any amount in excess of what it got from them?—A. No.

"Q. It is mathematically impossible, is it not, on these two contracts?—A. No; it is not mathematically impossible because we pay her $49.15 as long as she lives.

"Q. Will the Connecticut General Life Insurance Company ever be compelled to pay to the beneficiary designated by this decedent any amount—I will put it this way: At the time of writing these two documents which are designated Petitioners' Exhibit 1 and 2,

64 it could be stated with an absolute certainty by Connecticut General Life Insurance Company that upon the death of Cecile LeGierse it would pay out a maximum amount which would be less than the premium, aggregate premiums, charged for both of these?—A. That is correct.

"Q. And the monthly amount of $49.15 payable to Cecile LeGierse under the document stamped as Petitioners' Exhibit 2 which is the monthly payment contract——A. That is right.

"Q. Is less than the company was realizing—is less than the return the company was realizing on the payment in the amount equivalent to these premiums at the time it was issued.—A. Not on the amount of those premiums. On the amount of the premiums less expenses, taxes, various charges in connection with the contract.

"Q. Right.—A. That is correct.

"Q. What is the highest age at which your company will issue a life insurance contract without the issuance of an annuity policy where there is no physical examination?—A. Well, if it is group insurance at any age.

"Q. This is not group insurance. Let's confine it to——A. I am sorry. I have to make some qualification. It depends on the type of insurance you mention.

"Q. Let's say ordinary life insurance in which you deal with one individual single premium policy.—A. On a single premium policy today it would go to seventy."

REDIRECT EXAMINATION

No physical examination is required in certain types of life insurance policies in my company. That might include a single-premium policy. A person eighty years old has an expectancy under the American experience mortality tables. I do not recall offhand what that expectancy is, but I would guess it might be four to five years, possibly a little more than that.

65

"Q. Suppose a man walks into your office and said he would pay you $25,000 for a $25,000 life insurance policy. Are you prepared to say your company would not under any conditions issue to him that policy without an annuity if he were eighty years of age?—A. I will admit the proposition has not been put up to us. But I think I can say this: that we could not issue any contract—it would not be in accordance with the regular schedule of rates. Otherwise it would be a discrimination on rate structure which would not be permissible."

I believe most states would stop us from doing it. But the matter of discrimination would come into the thing, and there is some expenses and taxes to take care of. And presumably that would be a no underwriting case so that we would not only have to have the face of the policy but more than the face of the policy. We would have issued this particular annuity contract without the life insurance policy. We were paying the deceased $49.15 per month under the annuity. If she had lived twenty years we would have paid her roughly $12,000 on the annuity.

"Q. Now based on your investment experience or your knowledge of your investment department of your company, could you have earned that much in that period of time on the amount paid for the life insurance policy?—A. Well, again I go back to this principle of risks. On any life annuity contract a person might buy it today, die tomorrow, but the person who died tomorrow, the reserve forfeited by that person goes to help pay on the person who lives on and on beyond the time they were expected to live. It is the group principle involved so that it not only involves the principle I have mentioned but also involves——

66

"Q. Yes; but the respondent's attorney has attempted to show by the issuance of these two contracts the Connecticut General Life Insurance Company assumed no insurance risk. Only an investment risk. But if, as a matter of fact, in your opinion the assured in this case had lived twenty years instead of only about one month, you would have sustained a loss on the two contracts,

would you not?—A. That is a pretty hard question to answer directly.

"Q. I will ask you this: do you know whether or not you can earn six per cent on your investment?—A. You cannot earn six per cent on your investments; no.

"Q. Paying at the rate of $600 a year, if my figures are correct, it is about fourteen per cent.

"Mr. NONEMAN. On what?

"Mr. MCKENZIE. On the four thousand, one hundred and seventy-nine.

"Mr. NONEMAN. I was talking to him about the premium on both policies combined, and the rate of return on that is slightly over two per cent.

"The WITNESS. That is correct.

"Q. (By Mr. McKENZIE.) I am trying to show there was an element of risk, of insurance risk because if she had lived to be one hundred instead of dying at eighty, you would have suffered a loss on the two contracts rather than have made a profit as you
67 did, is that not true?—A. I really do not know how I can answer. The fact whether or not you made a profit on that contract may depend on what other contracts you offered to the person and they have taken it. This happens to be a combination of single life contracts and single premium life annuity. You are making a question of putting a combination of ordinary life contracts on terms insurance on some other rate.

"Whether or not you make a profit or a person lives or dies for a certain period is hard to determine.

"As I say, I take the whole thing on a group basis and not on an individual case. You may say there was a loss or a gain on an individual case, but in the group as a whole you cannot point to it as directly as that."

Thereupon there was offered and received and filed the second amended answer of the respondent (petitioner on review) and thereupon there was entered of record a general denial with respect to the allegations of Paragraph 8 of the amended petition.

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

(Signed) J. P. WENCHEL,
R. L. W.,
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

68 The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, as attorney for the respondents on review.

(Sgd.) FREDERICK O. MCKENZIE,
Attorney for Respondents on Review.

Order settling statement of evidence

The foregoing is all of the material evidence adduced at the hearing, and in order that the same may be preserved and made a part of the record, this statement of evidence is duly approved and settled this 18th day of October, 1939.

(S) EUGENE BLACK,
Member, U. S. Board of Tax Appeals.

RFS. Spt. 10-10-39.

69 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 92,103

Praecipe for record

Filed October 17, 1939

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board,
(a) Petition, including annexed copy of deficiency letter.
(b) Second amended answer.
3. Findings of fact, opinion, and decision of the Board.
4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

70 5. Statement of Evidence as settled and allowed.

6. Order enlarging time for the preparation of the evidence and for the transmission and delivery of the record.

7. This Praecipe.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 13 day of October 1939.

(S) FREDERICK O. MCKENZIE,
Attorney for Respondents on Review.

71 [Clerk's certificate to foregoing transcript omitted in printing.]

72 In United States Circuit Court of Appeals for the Second Circuit

No. 232—October Term, 1939

(Argued February 14, 1940—Decided March 25, 1940)

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

EDYTHE LE GIERSE AND BANKERS TRUST COMPANY, AS EXECUTORS OF THE ESTATE OF CECILE LE GIERSE, DECEASED, RESPONDENTS

Petition to review a decision of the United States Board of Tax Appeals

The commissioner seeks reversal of the Board's decision that there was no deficiency in the estate tax of the respondents as executors of the estate of Cecile Le Gierse, deceased. Affirmed.

For the opinion of the Board see 39 B. T. A. 1134.

Before SWAN, AUGUSTUS N. HAND, and PATTERSON, Circuit Judges.

Samuel O. Clark, Jr., Assistant Attorney General; Sewall Key, and Maurice J. Mahoney, Special Assistants to the Attorney General, for petitioner. Frederick O. McKenzie, Attorney for respondents.

73 *Opinion*

SWAN, Circuit Judge:

At the date of her death on January 1, 1936, Mrs. Le Gierse had a policy of insurance upon her life for $25,000 payable to her

daughter. Because of the circumstances under which the policy was taken out, the commissioner ruled that the sum receivable by the beneficiary named in the policy was not "insurance" within the meaning of section 302 (g) of the Revenue Act of 1926 as amended,[1] but represented a transfer to take effect in possession or enjoyment at or after death, and as such must be included in the decedent's gross estate under section 302 (c) as amended. Accordingly he assessed a deficiency. This the Board set aside, following its prior decision in Estate of Anna M. Keller, 39 B. T. A. 1047. For a discussion of the Keller decision see 49 Yale L. J. 946. The correctness of the Board's action is the question presented to the court.

The facts as found by the Board are briefly as follows: On December 6, 1935 Mrs. Le Gierse, who was then 80 years old but in good health and not in contemplation of death, took out a single premium life insurance policy for $25,000 upon her own life, naming her daughter as the beneficiary. The policy was in the standard form. The single premium paid for the policy
74 was $22,946. On the same date Mrs. Le Gierse purchased from the same insurance company a single premium life annuity in the standard form for annuity contracts. It cost her $4,179 and entitled her to receive $49.15 monthly during her life. In form the two policies were separable and independent, but the insurance company would not have issued the life policy, in view of the insured's advanced age, without the purchase by her of the annuity; although it would have sold her the annuity without requiring her to purchase the life policy. In computing the single premium charged for each policy no adjustment was made on account of the premium to be received on the other. At the time the policies were issued Mrs. Le Gierse had an expectancy of about four or five years under the American experience tables. However, she was stricken with cerebral apoplexy on December 24, 1935, and this resulted in her death on January 1, 1936.

The commissioner argues that the decedent's dealings with the insurance company must be viewed as a single transaction, and so viewed the transaction was in substance a payment by Mrs. Le Gierse of $27,125 as consideration for the insurance company's

[1] Section 302 (g) as amended by section 404 of the Revenue Act of 1934, 48 Stat. 754, reads as follows:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * *.

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

promise to pay her $49.15 monthly during her life and on her death to pay $25,000 to her daughter. Therefore, it is said, the company received more than it would ever have to pay out, the element of risk essential to an insurance policy was eliminated; and the life policy was not "genuine" insurance such as section 302 (g) exempts from inclusion in the gross estate. We agree that the entire transaction is to be considered. Although generally arrangements entered into at the same time are to be taken as one agreement, that is not the case where the parties intend that they be deemed independent contracts. Williston, Contracts, 2d ed., § 628. Here the undertakings of the insurance company were obviously intended to be separable and independent. A separate application was made for each policy, a separate
75 consideration paid for each, neither policy made reference to the other, and either could have been assigned, and the life policy could have been surrendered, without affecting the insurance company's obligations under the other. In these respects the situation is unlike that presented in Old Colony Trust Co. v. Commissioner, 102 F. (2d) 380 (C. C. A. 1) upon which the petitioner strongly relies. In substance as well as in form the policies issued to Mrs. Le Gierse were independent contracts. In the life policy she took out insurance upon her life which is squarely within the exemption granted by the statute. The fact that she could not have gotten that policy unless she had also bought an annuity contract does not change the character of what she got.

If it were to be conceded that there was a deliberate avoidance of estate taxes in this case, the fact would be immaterial. Congress permits such an avoidance by granting an exemption, up to $40,000, of life insurance payable to beneficiaries other than the decedent's executor. There is no suggestion in the statute that the exemption is to be denied if the insured's motive in buying the insurance is to reduce the gross estate he may leave at death. A taxpayer is privileged to decrease the amount of what otherwise would be his taxes by means which the law permits. See United States v. Isham, 17 Wall. 496, 506; Gregory v. Helvering, 293 U. S. 465, 469; Chisholm v. Commissioner, 79 F. (2d) 14 (C. C. A. 2), cert. denied 296 U. S. 641.

Order affirmed.

76 IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

EDYTH LE GIERSE AND BANKERS TRUST CO. AS EXECUTORS, ETC., RESPONDENTS

Appeal from the United States Board of Tax Appeals

Judgment

Filed April 13, 1940

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. ROBERTS, *Clerk.*

77 [File endorsement omitted.]

78 [Clerk's certificate to foregoing transcript omitted in printing.]

79 Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 44586. U. S. Circuit Court of Appeals, Second Circuit. Term No. 237. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner vs. Edyth Le Gierse and Bankers Trust Company, as Executors of the Estate of Cecile Le Gierse, Deceased. Petition for a writ of certiorari and exhibit thereto. Filed July 12, 1940. Term No. 237 O. T. 1940.

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CHARLES ELMORE CROPLEY
CLERK

No. 237

In the Supreme Court of the United States

OCTOBER TERM, 1940

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

EDYTH LE GIERSE AND BANKERS TRUST COMPANY, AS EXECUTORS OF THE ESTATE OF CECILE LE GIERSE, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

EDYTH LE GIERSE AND BANKERS TRUST COMPANY, AS EXECUTORS OF THE ESTATE OF CECILE LE GIERSE, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause on April 13, 1940, affirming the decision of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 18–29) is reported in 39 B. T. A. 1134. The opinion of the Circuit Court of Appeals (R. 72–74) is reported in 110 F. (2d) 734.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 13, 1940 (R. 74). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent at 80 years of age was uninsurable. However, in conjunction with her purchase of an annuity, there was issued to her a so-called single premium life insurance policy. The effect of the combined annuity and insurance policies was to eliminate the risk inherent in life insurance.

The question presented is whether, in view of the absence of risk, the proceeds of the so-called insurance policy constituted an amount receivable "as insurance" within the meaning of Section 302 (g) of the Revenue Act of 1926, thereby enabling the decedent's estate to claim the special $40,000 estate tax exemption applicable to insurance.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in the Appendix, *infra,* pp. 7–14.

STATEMENT

The facts, as found by the Board of Tax Appeals (R. 19–28), may be summarized as follows:

Cecile Le Gierse, a resident of New York, died of paralysis or cerebral apoplexy on January 1,

1936, at 80 years of age. She had suffered from chronic arthritis for eight or ten years but her condition had never reached an "acute" stage. (R. 19–20.)

On December 6, 1935, less than one month prior to her death, decedent entered into two "contracts" with the Connecticut General Life Insurance Company of Hartford, Connecticut. One was an annuity contract in standard form, and the other was a so-called "Single Premium Life Policy—Non Participating" also in standard form, containing the usual provisions for cash surrender, optional modes of settlement at maturity, etc. (R. 20–24.) *The insurance company would not have issued the insurance policy without the annuity* (R. 25–26). No physical examination was taken by the decedent, nor did she answer in her application for insurance the additional questions to be answered when the applicant is a woman (R. 24–25).

A regular form for proof of death was submitted and upon receipt thereof the proceeds of the life insurance in the amount of $25,000 were available to the beneficiary, Edyth Le Gierse. However, upon proof of death the company was requested by the beneficiary to retain the proceeds under one of the additional modes of settlement included in the life insurance policy issued (R. 25).

The company treated the two contracts as separate and issued a separate receipt to the decedent as to each, for the amount above referred to. The

company maintains separate reserves for insurance and annuities. The $22,946 premium paid for the life insurance policy was credited to the insurance account and the $4,179 paid for the annuity was credited to the annuity account. The company is required to report, to the state commissioner of insurance, insurance policies issued and canceled, also annuities issued and canceled, and the two contracts were reported under the two groups, one under life insurance and one under annuities. In computing the single premium paid for the life insurance policy, no adjustment was made for the amount to be received as a premium for the annuity policy. Likewise, in computing the amount charged for the annuity policy, no adjustment was made for the single premium to be received on the insurance policy. (R. 25.)

The Commissioner determined that both policies were purchased as one transaction and as such the proceeds were not receivable as "life insurance," but that the entire transaction represented a transfer made to take effect at or after death in accordance with the provisions of Section 302 (c) of the Revenue Act of 1926, as amended. (R. 27–28.) The Board of Tax Appeals reversed this determination, holding that the proceeds of the policies qualified as an amount receivable "as insurance" within Section 302 (g) with the consequence that such proceeds would be exempt since they aggregated less than $40,000. (R. 29.) The Circuit

Court of Appeals, although conceding that "the entire transaction is to be considered", nevertheless affirmed the decision of the Board. (R. 73-74.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding and deciding that the so-called single-premium life insurance policy, issued in conjunction with the life annuity contract, is a life insurance policy within the purview of Section 302 (g) of the taxing statute, as amended.

2. In holding and deciding that the so-called life insurance policy, issued in conjunction with the life annuity contract, could be given effect as a life insurance policy within the purview of the statute although it would not have been issued as a separate and independent contract.

3. In not holding and deciding that the disposition made by the decedent of the proceeds arising out of the so-called life insurance policy constituted a transfer in contemplation of or intended to take effect in possession or enjoyment at or after the decedent's death, within the purview of Section 302 (c).

4. In not holding that the so-called insurance policy or proceeds therefrom were includable in the decedent's gross estate under Section 302 (a) or Section 302 (d).

5. In not holding that the so-called life insurance policy was not an insurance policy upon the

life of the decedent within the meaning of the statute.

6. In not reversing the decision of the Board of Tax Appeals and affirming the determination of the Commissioner of Internal Revenue.

7. In holding there was no deficiency in tax under the facts as adduced.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is squarely in conflict with two other recent decisions in the Circuit Courts of Appeals. *Commissioner* v. *Tyler* (C. C. A. 8th), decided April 29, 1940, not yet officially reported but found in 1940 C. C. H., Vol. 4, Par. 9439, and *Commissioner* v. *Keller* (C. C. A. 3d), decided May 28, 1940, not yet officially reported but found in 1940 C. C. H., Vol. 4, Par. 9494.

2. This case presents an important question in the administration of the federal estate tax laws. We are advised by the Treasury Department that there are between 300 and 400 like cases pending in the Bureau of Internal Revenue involving substantial amounts of revenue.

CONCLUSION

In view of the conflict of decisions and the general importance of the question presented, it is respectfully submitted that this petition should be granted.

FRANCIS BIDDLE,
Solicitor General.

JULY 1940.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and by Sections 401 and 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

(a) To the extent of the interest therein of the decedent at the time of his death;

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money

or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

(d)(1) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

* * * * *

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

* * * * *

(U. S. C., Title 26, Sec. 411.)

Treasury Regulations 80 (1937 Ed.):

ART. 13. PROPERTY OF DECEDENT AT TIME OF DEATH.—It is designed by the foregoing provision of the statute that there shall be included in the gross estate all property of the decedent, whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of

his death, except real property situated outside the United States.

* * * * * *

ART. 18. TRANSFERS WITH POSSESSION OR ENJOYMENT RETAINED.—(a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, whether in trust or otherwise, made subject to the reservation or retention by the decedent of the use, or the possession, or the rents or other income or enjoyment of the transferred property, or any part thereof, for his life, or for a period not ascertainable without reference to his death, or for such a period as to evidence his intention that it should extend at least for the duration of his life; including also the reservation or retention of the use, possession, rents, or other income the actual enjoyment of which, by the decedent, was to be postponed until the termination of a transferred precedent interest or estate. (See article 15).

If for any such period the use, possession, rents, or other income (in whole or in part) were to be disposed of in discharge of a legal obligation of the decedent or otherwise for his pecuniary benefit, then to that extent the use, possession, rents, or other income will be treated as having been reserved to or retained by the decedent.

(b) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of

this subdivision do not apply (1) if the transfer was made prior to 10:30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m. eastern standard time, June 6, 1932. See section 506 of the Revenue Act of 1934.

ART. 19. TRANSFERS WITH RIGHT RETAINED TO DESIGNATE WHO SHALL POSSESS OR ENJOY.—(a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, by trust or otherwise, in connection with which the decedent reserved or retained, either to himself alone or in conjunction with any other person or persons, the right during his life, or for a period not ascertainable without reference to his death, or for such a period as to evidence an intention that the right should continue for at least the duration of his life, to designate the person or persons who should possess or enjoy the transferred property (in whole or in part), or any of the income thereof. (See article 15).

(b) *Taxability.*—If the transfer was not a bona fide sale for an adequate and full consideration in money or money's worth, the property or the interest or interests therein so transferred shall be included in the gross estate if falling within any one of the following paragraphs:

* * * * *

(3) When the transfer was made and decedent died after the enactment of the Revenue Act of 1932 (5 p. m. eastern standard time, June 6, 1932) and the right to so designate was reserved at the time of the transfer, whether exercisable by decedent alone or in conjunction with a person or persons having

or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

As used in this article, the expression "reserved at the time of the transfer" includes any understanding, expressed or implied, had in connection with the making of the transfer that the right to designate the person or persons who should possess or enjoy the property or the income therefrom should later be created or conferred.

ART. 20. TRANSFERS WITH POWER TO CHANGE THE ENJOYMENT—(a) *Transfers included.*—Subdivision (d) of section 302 of the Revenue Act of 1926, as amended, embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See article 15.)

* * * * *

(b) *Taxability.*—The property or the interest or interests therein so transferred shall be included in the gross estate if coming within any one of the following paragraphs:

(1) Regardless of when the transfer was made, if the decedent died after the enactment of the Revenue Act of 1916 (September 8, 1916), and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction

with a person or persons having no substantial adverse interest or interests in the transferred property, or if exercisable in conjunction with a person having a substantial adverse interest or with several persons some or all of whom held such an adverse interest, then to the extent of any interest or interests held by a person or persons not required to join in the exercise of the power and any adverse interest which was not substantial.

(2) When the transfer was made after the enactment of the Revenue Act of 1924 (4:01 p. m., eastern standard time, June 2, 1924) and before the amendment of the subdivision by the Revenue Act of 1936 became effective (June 23, 1936), and the decedent's death occurred at any time subsequent to the transfer, and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

* * * * *

As used in this and in the next succeeding article, the expression "reserved at the time of the transfer" refers to a power which, having been reserved when the transfer was made, continued to the date of decedent's death (see the paragraph next following as to the conditions under which the power will be considered as existent at decedent's death) to be exercisable by decedent alone or by him in conjunction with some other person or persons, and includes any understanding, expressed or implied, had in con-

nection with the making of the transfer that the power should later be created or conferred.

The power to alter, amend, revoke, or terminate will be considered to have existed on the date of the decedent's death, though the exercise of the power was subject to a precedent giving of notice, or though the alteration, amendment, revocation, or termination would take effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice had been given or the power had been exercised, or through the exercise of the power was restricted to a particular time or the happening of a particular event which had not arrived or occurred at decedent's death. When determining the value of the gross estate in such cases the full value of the property transferred subject to the power should be discounted for the period required to elapse between the date of decedent's death and the date upon which the alteration, amendment, revocation, or termination could take effect. (See article 10 (i) (3)).

* * * * *

ART. 25. TAXABLE INSURANCE.—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (a) All insurance receivable by, or for the benefit of, the estate; (b) all other insurance to the extent that it exceeds in the aggregate $40,000.

The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is considered to have been taken out by the decedent, whether or not he made the

application, if he acquired the ownership of, or any legal incident thereof in, the policy; but in the case of a decedent dying before November 7, 1934 (the date of approval of the 1934 edition of Regulations 80), the provisions of the second paragraph of article 25 of Regulation 70 (1929 edition) will continue to apply. Legal incidents of ownership in the policy include, for example: The right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc.

ART. 27. INSURANCE RECEIVABLE BY OTHER BENEFICIARIES.—The statute requires the inclusion in the gross estate of the decedent of the proceeds of any policy, or the aggregate proceeds of all policies, not receivable by or for the benefit of decedent's estate, to the extent that such proceeds exceed $40,000, regardless of when the policy was or the policies were issued, if the decedent possessed at the time of his death any of the legal incidents of ownership.

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in the appropriate schedule of Form 706. The word "beneficiaries," as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

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No. 237

In the Supreme Court of the United States

OCTOBER TERM, 1940

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

EDITH LE GIERSE AND BANKERS TRUST COMPANY, AS EXECUTORS OF THE ESTATE OF CECILE LE GIERSE, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 9–17) is reported in 39 B. T. A. 1134. The opinion of the Circuit Court of Appeals (R. 40–42) is reported in 110 F. (2d) 734.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 13, 1940 (R. 43). The petition for a writ of certiorari was filed July 12, 1940,

and was granted October 14, 1940 (R. 43). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent at 80 years of age was uninsurable. However, in conjunction with her purchase of an annuity, there was issued to her a so-called single premium life-insurance policy. The effect of the combined annuity and insurance policies was to eliminate the risk inherent in life insurance on the part of the insurance company and to provide decedent's beneficiary with no protection against loss resulting from death.

The question presented is whether, in these circumstances, the proceeds of the so-called insurance policy constituted an amount receivable "as insurance" within the meaning of Section 302 (g) of the Revenue Act of 1926, thereby enabling the decedent's estate to claim the special $40,000 estate tax exemption applicable to insurance.

STATUTE AND REGULATIONS INVOLVED

The pertinent statutory provisions and Regulations will be found in the Appendix, *infra*, pp. 26–33.

STATEMENT

The facts, as found by the Board of Tax Appeals (R. 9–16), may be summarized as follows:

Cecile Le Gierse, a resident of New York, died of paralysis or cerebral apoplexy on January 1, 1936, at 80 years of age. She had suffered from chronic arthritis for eight or ten years but her condition had never reached an acute stage (R. 10).

On December 6, 1935, less than one month prior to her death, decedent entered into an agreement with the Connecticut General Life Insurance Company of Hartford, Connecticut, pursuant to which the company issued to her two "policies." One was an annuity contract in standard form, and the other was a so-called "Single Premium Life Policy—Non Participating", also in standard form, containing the usual provisions for cash surrender, optional modes of settlement at maturity, etc. (R. 11–13). *The insurance company would not have issued the insurance policy without the annuity, considering the age of the decedent.* It would have issued the annuity contract without the insurance policy. (R. 14.) No physical examination was taken by the decedent, and she was not required in her application for insurance to answer the additional questions which must normally be answered when the applicant is a woman (R. 13).

The annuity contract provided for payments to the decedent of $49.15 a month, or $589.80 a year; the life-insurance policy provided for the payment

of $25,000 to the decedent's daughter upon the decedent's death. For the two policies the decedent paid the insurance company in advance the sum of $27,125; of this amount, $4,179 represented the premium for the annuity contract and $22,946 represented the premium for the "insurance" policy. The annuity payments which the insurance company agreed to make to the decedent amounted only to slightly more than 2 percent of the aggregate amount paid by the decedent to the company and was less than what the company realized on that amount annually, less expenses, taxes, and other charges in connection with the policies. Similarly, the total amount to be paid by the company at decedent's death was less than the aggregate amount paid by the decedent to the company. Consequently, at the time of the issuance of the policies, it was apparent that upon decedent's death the company would pay out a maximum amount, including the annuity payments, of less than the aggregate premiums charged for both policies and the return received by the company on those premiums. (R. 11–12, 14–15, 21–22, 26.)

The principal reason given by the decedent for entering into the agreement with the insurance company was her desire to preserve the principal of her estate from further shrinkage; the estate tax situation did, however, come up in the discussion between the decedent and the life insurance agent. The decedent knew a great deal about

taxes and was getting practically no income from her investment in securities. One of the reasons for her action was to provide her daughter with cash to take care of estate taxes, but the primary factor was the conservation of the principal of her estate. (R. 13–14.)

The company treated the two contracts as separate and issued a separate receipt to the decedent for each. The company maintains separate reserves for insurance and annuities. The $22,946 premium paid for the life-insurance policy was credited to the insurance account and the $4,179 paid for the annuity was credited to the annuity account. The company is required to report to the state commissioner of insurance all insurance policies issued and canceled, and also all annuities issued and canceled; the two contracts were reported under the two groups, one under life insurance and the other under annuities. In computing the single premium paid for the life-insurance policy, no adjustment was made for the amount to be received as a premium for the annuity policy. Likewise, in computing the amount charged for the annuity policy, no adjustment was made for the single premium to be received on the insurance policy. (R. 14.)

The Commissioner determined that both policies were purchased as one transaction, that the proceeds of the life-insurance policy were not received "as insurance" within the meaning of Section

302 (g) of the Revenue Act of 1926, and that consequently decedent's estate was not entitled to the $40,000 insurance exemption provided by Section 302 (g). Treating the entire transaction as a transfer made to take effect at or after death within the meaning of Section 302 (c), of the 1926 Act, the Commissioner determined a deficiency of $3,875.29 (R. 10, 15–16). The Board of Tax Appeals reversed this determination, holding that the proceeds of the life-insurance policy were received "as insurance," and that the estate was therefore entitled to the exemption (R. 16–17). The Circuit Court of Appeals, although conceding that "the entire transaction is to be considered" (R. 42), affirmed the decision of the Board (R. 43).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding and deciding that the so-called single-premium life-insurance policy, issued in conjunction with the life annuity contract, is a life-insurance policy within the purview of Section 302 (g) of the taxing statute, as amended.

2. In holding and deciding that the so-called life-insurance policy, issued in conjunction with the life annuity contract, could be given effect as a life-insurance policy within the purview of the statute although it would not have been issued as a separate and independent contract.

3. In not holding and deciding that the disposition made by the decedent of the proceeds arising

out of the so-called life-insurance policy constituted a transfer in contemplation of or intended to take effect in possession or enjoyment at or after the decedent's death, within the purview of Section 302 (c).

4. In not holding that the so-called life-insurance policy was not an insurance policy upon the life of the decedent within the meaning of the statute.

5. In not reversing the decision of the Board of Tax Appeals and affirming the determination of the Commissioner of Internal Revenue.

6. In holding there was no deficiency in tax under the facts as adduced.

SUMMARY OF ARGUMENT

1. The decision of the court below represents the triumph of a paradox. The Board found, and respondents concede, that the decedent was uninsurable. Yet the court below concluded that the very company which considered the decedent uninsurable did in fact insure her, and did so without departing from its customary standards. This paradoxical result stems from a failure on the part of the court below to comprehend that the life-insurance policy issued to decedent was merely the form by which the parties carried out an agreement which in substance involved no insurance feature whatever.

Life insurance is, in essence, the shifting from the insured to the insurer of the risk of loss due to the insured's death before the end of his life expectancy. Decedent's agreement with the insurance company provided for no such shifting of risk. Decedent paid the company the sum of $27,125. In return, the company agreed to pay her $589.80 a year during her life (this being slightly more than 2 percent of $27,125), and to pay her daughter $25,000 upon her death. The only risks which decedent transferred to the insurance company were the risk that her principal of $27,125 might not bring her a return during life equal to $589.80 a year, and the risk that that principal might depreciate in value to less than $25,000 by the time she died; these risks are obviously investment risks and not the life insurance risk of death before the end of the insured's life expectancy. So far as the company's financial situation was concerned, the time of decedent's death was completely immaterial. Plainly, therefore, the agreement between the decedent and the company involved no life insurance feature whatever.

This conclusion, apparent from the face of the agreement, is also supported by extrinsic evidence. The Board found that the principal purpose of the decedent in entering into the agreement was to conserve the principal of her estate. This is not an

insurance but an investment purpose. Similarly, the company had no purpose to insure the decedent's life. It considered her uninsurable because of age—indeed, so completely uninsurable that a physical examination to determine the extent of the insurance risk was considered immaterial and was, therefore, not required. It would have refused to issue the life insurance policy to her had she not taken out the annuity policy in conjunction therewith. It is clear, therefore, that the company's purpose was not to insure the decedent's life but to make a profitable investment contract.

Since the agreement made by decedent with the company did not involve any insurance of her life, the insurance exemption provided by Section 302 (g) is not available to respondents simply because a life insurance policy was employed as the form in which part of the agreement was effectuated.

2. No insurance of decedent's life being involved, the transfer by the decedent to the insurance company is taxable under Section 302 (c) of the Revenue Act of 1926. This section requires the inclusion in decedent's gross estate of the value of all property to the extent of any interest therein of which the decedent at any time made a transfer, by trust or otherwise, intended to take effect in possession or enjoyment at decedent's death. The broad purpose of the provision is to tax "*inter vivos* transfers that are too much akin to testa-

mentary dispositions not to be subjected to the same excise." *Helvering* v. *Hallock*, 309 U. S. 106, 111–112. Here the record discloses an *inter vivos* transfer intended to pass property to the beneficiary at decedent's death—an arrangement wholly testamentary in character. To hold that such an arrangement does not fall within Section 302 (c) is to give effect to the form of the transaction while ignoring its substance.

ARGUMENT

I

DECEDENT'S AGREEMENT WITH THE INSURANCE COMPANY DID NOT CONSTITUTE A CONTRACT OF LIFE INSURANCE

Section 302 (g) of the Revenue Act of 1926, as amended (*infra*, pp. 26–27), provides for the inclusion in the gross estate of the decedent, for estate-tax purposes, of insurance proceeds—

> To the extent of the amount receivable by the executor *as insurance* under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries *as insurance* under policies taken out by the decedent upon his own life. [Italics supplied.]

The question here is whether the decedent's agreement with the insurance company, which involved no risk on the part of the company and provided the decedent's beneficiary no protection against loss resulting from death, nevertheless constituted

a contract of life insurance because it was carried out in part through the issuance of a life-insurance policy. The decision of the court below that the agreement did constitute such a contract is in direct conflict with the decisions of the Circuit Courts of Appeals for the Third and Eighth Circuits in *Commissioner* v. *Keller's Estate*, 113 F. (2d) 833 (C. C. A. 3d), and *Helvering* v. *Tyler*, 111 F. (2d) 422 (C. C. A. 8th).[1] Writs of certiorari have been granted in these two cases (Nos. 368 and 371, respectively) and the *Keller* case is to be argued

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[1] The decision below is also in substantial conflict with *Old Colony Trust Co.* v. *Commissioner*, 102 F. (2d) 380 (C. C. A. 1st). In that case the entire agreement between the decedent and the insurance company was embodied in a single policy; the Circuit Court of Appeals for the First Circuit held that no insurance exemption was available because the annuity feature of the policy predominated and gave the agreement the character of an investment rather than of an insurance contract.

The state courts in many cases have also indicated a view at variance with that of the court below, although the situation presented in those cases was not precisely the same as that presented here. See *State ex rel. Thornton* v. *Probate Court*, 186 Minn. 351; *People ex rel. Metropolitan Life Ins. Co.* v. *Knapp*, 184 N. Y. S. 345; *Commonwealth* v. *Metropolitan Life Ins. Co.*, 254 Pa. 510, 514; *Urwan v. Northwestern Nat. Life Ins. Co.*, 125 Wis. 349; *Schreiber* v. *German-American Hail Ins. Co.*, 43 Minn. 367; *Timlin* v. *Equitable Life Assurance Society*, 141 Wis. 276; *Welch* v. *Union Cent. Life Ins. Co.*, 108 Iowa 224; *Mutual Life Ins. Co.* v. *New*, 125 La. 41.

The result reached by the court below has been disapproved by several of the leading law reviews. Note (1940) 40 Col. L. Rev. 86; Note (1940) 49 Yale L. J. 946; Note (1940) 38 Mich. L. Rev. 526. See also Paul, *Studies in Federal Taxation* (3rd Series), 374–386, 388–391.

immediately following the present case. Counsel have stipulated that the disposition of the *Tyler* case is to be governed by the decision in the present case.

The decision of the court below represents the triumph of a paradox. The Board found, and respondents concede, that the decedent was uninsurable. Yet the court below concluded that the very company which considered the decedent uninsurable did in fact insure her and did so without departing from its customary standards.

In our view, this paradoxical result stems from a failure on the part of the court below to comprehend that the life-insurance policy issued to decedent was merely the *form* by which the parties carried out an agreement which *in substance* involved no insurance feature whatever. This will become clear upon analysis of the essential elements of an insurance contract and upon comparison of such a contract with the agreement here involved.

There is a substantial unanimity of authority among both courts and commentators as to the fundamental nature of insurance. The purpose of insurance is to furnish protection against loss from a defined risk by having the losses of the unfortunate few paid by contributions of the many who are exposed to the same risk. The insurance company is the medium through which this end is accomplished. The individual transfers the bur-

den of risk to the company; the company, through the issuance of a large number of policies to other individuals facing the same risk, in effect distributes the risk of each among the whole group. The practical result is to associate all the policyholders in an agreement that all will share the loss of each.

In the case of life insurance, the risk insured against is that of premature death—i. e., death before the end of the insured's life expectancy. In the event of such premature death, the loss to the insured's beneficiaries is borne by the insurance company, which must pay out to the beneficiaries a larger sum than the value of the insured's payments to it. The loss to the insurance company is, in turn, made up by the contributions of those who outlive their life expectancies and who, therefore, pay for protection against a risk of loss which has not materialized.

It is apparent, therefore, that there are at least three essential elements in every insurance contract: (1) the contract must provide for the shifting of a risk from the insured to the insurer; (2) from the standpoint of the insured, the contract must provide protection against loss in the event that the contingency insured against occurs; and (3) from the standpoint of the insurer, the risk assumed must be consolidated with other similar risks, so that the losses which occur may be paid through the contributions of those who do not suffer loss.

A few of the many authorities supporting the foregoing analysis are cited in the margin.[2] Typical of the statements made in these authorities are the following:

> It is the fundamental purpose of life insurance to furnish protection through the operation of the insurance function against the financial needs occasioned by death, old age, or disability. Through the agency of insurance the burden of risk is transferred from the shoulders of the individual to whom it is attached to a carrier willing to assume it. The end is accomplished by associating a large number of individuals exposed to the risk in question by means of an agreement that the entire group shall share the losses of individuals. [Magee, *Life Insurance*, p. 1.]
>
> From what has been said it is evident that *the primary requisite essential to the existence of every contract of insurance is the presence of a risk of loss.* The insurer, in

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[2] Cooley, *Briefs on the Law of Insurance*, Vol. I, p. 80; Huebner, *Life Insurance*, pp. 4, 10, 19–20; Vance, *Handbook of the Law of Insurance*, pp. 3–5; Magee, *Life Insurance*, p. 1; Manes, *Insurance: Principles and History*, 8 Encyc. Soc. Science (1932), p. 95; Mowbray, *Insurance, Its Theory and practice in the United States*, pp. 1, 26, 150; (1939) 52 Harv. L. Rev. 1180; Note (1940) 38 Mich. L. Rev. 526; Note (1937) 32 Ill. L. Rev. 223, 233; Note (1936), 36 Col. L. Rev. 456; Notes, 63 A. L. R. 711, 100 A. L. R. 1449; *Ritter* v. *Mutual Life Ins. Co.*, 169 U. S. 139, 151–152; *Old Colony Trust Co.* v. *Commissioner*, 102 F. (2d) 380 (C. C. A. 1st); *Home Title Ins. Co.* v. *United States*, 50 F. (2d) 107 (C. C. A. 2d), affirmed, 285 U. S. 191; *Commonwealth* v. *Equitable Beneficial Ass'n*, 137 Pa. 412, 419.

> return for a consideration paid to him by the insured, assumes this risk, and wherever such risk exists and is assumed by one of the parties to the contract, whatever form a contract may take, it is in fact a contract of insurance. Risk is essentially the subject of the contract. *If there be no risk there can be no contract, and until the risk commences the contract does not attach.* (*Hart* v. *Delaware Ins. Co.*, 11 Fed. Case 683.) [Italics supplied.] [Cooley, *Briefs on the Law of Insurance*, Vol. I, p. 80.]
>
> To grant indemnity or security against loss, for a consideration, is not only the design and purpose of an insurance company, but is also the dominant and characteristic feature of the contract of insurance. [*Commonwealth* v. *Equitable Beneficial Ass'n*, 137 Pa. 412, 419.]

Decedent's agreement with the insurance company involved none of these essential elements of insurance. There was no shifting of risk, there was no protection against loss resulting from death before the end of the insured's life expectancy, and, since the insurance company assumed no risk, it obviously did not perform the essential insurance function of consolidating risks.

The absence of insurance risk in the agreement is plain. Decedent paid the insurance company the sum of $27,125. In return, the company agreed to pay her $589.80 a year during her life (this being slightly more than 2 percent of $27,125), and to pay her daughter $25,000 upon her

death. The only risks which the decedent transferred to the insurance company were the risks that her principal of $27,125 might not bring her a return during life equal to $589.80 a year, and the risk that that principal might depreciate in value to less than $25,000 by the time she died; these risks are obviously investment risks and not the life insurance risk of death before the end of the insured's life expectancy. Conversely, these investment risks were the only risks assumed by the insurance company; apart from the possibility of a shrinkage in value in principal and a return on capital of less than 2 percent, the company incurred no risk of loss and its financial situation could not be affected by the time of decedent's death.[3]

[3] Respondents contended in their brief in the court below (p. 14) that the company might have sustained a loss if the decedent had lived and at the end of the first year had surrendered the insurance policy for its cash surrender value, which would then have been $19,515. The contention is without merit. Had the contingency suggested occurred, the insurance company would have received premiums of $7,577 in excess of the amount paid out as the cash surrender value of the insurance policy, and its only obligation would have been to pay the decedent $589.80 a year during her life. Assuming that the company realized only a 3 percent return on its capital, the decedent would have had to live 16½ years, or until the age of over 96, before the company suffered any loss. Decedent's life expectancy at the time of the issuance of the policies was about four or five years (R. 15).

Furthermore, even if the company did undertake a remote risk of loss in this situation, the risk would spring from the annuity rather than from the insurance feature of the agreement. Consequently, the existence of the risk, if any, would not show that decedent's life was insured.

Plainly, therefore, the agreement made between the decedent and the company was not designed to insure the life of the decedent, i. e., to protect against the risk of loss due to decedent's death before the end of her life expectancy.

This conclusion, apparent from the face of the agreement, is also supported by extrinsic evidence. The Board found, and the record conclusively establishes, that the principal purpose of the decedent in entering into the agreement was to conserve the principal of her estate. This, of course, is not an insurance but an investment purpose. The company, too, had no purpose to insure the decedent's life. It considered her uninsurable because of age—indeed, so completely uninsurable that a physical examination to determine the extent of the insurance risk was considered immaterial and was, therefore, not required. It would have refused to issue the life-insurance policy to her had she not taken out the annuity policy in conjunction therewith. It is clear, therefore, that the company's purpose was not to insure the decedent's life but to make a profitable investment contract.

Had the parties called in a scrivener to draft a simple contract embodying the principal features of their agreement, that contract would have provided merely for the transfer of $27,125 by the decedent to the company, in return for which the company agreed to pay the decedent $589.80 each

year during her life and, upon her death, to pay her daughter $25,000. The contract would not have had any resemblance to a life-insurance policy and it is obvious that no court would have held it to be a contract of insurance.

It can make no difference for purposes of the present case that, instead of drafting such a contract, the agreement was executed by the issuance of two standard policies, one an annuity and the other a life insurance policy. The character of these standard policies is such that, taken together, they achieve the same result as would have been achieved by the simple contract described. The standard annuity form provides for fixed payments during the annuitant's life; the standard life insurance form provides for the payment of a fixed sum at the death of the insured. When issued in conjunction, they perform the function neither of an annuity nor of an insurance contract, but instead serve to effectuate simply the type of investment contract above described.[4]

The explanation of the apparent phenomenon whereby the issuance of a standard life-insurance

[4] The true nature of the transaction cannot be obscured by the fact that the printed forms of insurance and annuity contracts which were used contain the usual options, privileges, restrictions, etc., which are always found in such contracts. The existence of these provisions does not in any way militate against the conclusion that the contract forms employed were merely a device to effectuate a transaction unrelated to the actual insurance of decedent's life. See *Helvering* v. *Tyler*, 111 F. (2d) 422, 426 (C. C. A. 8th).

policy serves to effectuate an investment contract involving no insurance lies in the fact that an annuity policy is the reverse of a life-insurance policy and that, when placed in juxtaposition, they serve to counteract one another economically. See Harwood and Francis, *Insurance and Annuities from the Buyer's Point of View* (9th ed, 1938), p. 120; Note (1940) 49 Yale L. J. 946, 952; Note (1940) 38 Mich. L. Rev. 526, 528; *Carroll* v. *Equitable Life Assur. Soc.*, 9 F. Supp. 223 (W. D. Mo.); *In re Walsh*, 19 F. Supp. 567 (D. Minn.). An annuity policy is advantageous to the policyholder and disadvantageous to the company if the annuitant outlives his life expectancy; the exact converse is true of life insurance. Consequently, when both types of policies are issued in conjunction, all risk of loss arising from the time of decedent's death disappears. The obligation to pay the annuity continues only so long as the annuitant lives; during this time, the insurance company is under no obligation to pay out the face amount of the life-insurance policy. As soon as the annuitant dies, obliging the company to pay out the face amount of the insurance policy, the obligation to pay the annuity ceases. It follows that in every case where the aggregate amount paid for the annuity and insurance policies equals or exceeds the face amount of the insurance policy, and where the return on that amount to the insurance company equals or exceeds the annual annuity payments,

there is no shifting of any risk of loss and consequently no element of insurance.

The issue here, then, comes down to the question whether Section 302 (g) grants an exemption in the case of all amounts payable in the form of proceeds under a life-insurance policy, even though that policy is merely a device to effectuate an investment contract involving no insurance feature, or whether it grants an exemption only where actual insurance of the decedent's life is involved. In our view, the intent of Congress was plainly to grant the exemption only in the latter situation. The purpose of the exemption was to encourage the institution of life insurance as "the least costly and most equitable device yet evolved to preserve families in a wage-earning society from destitution." See *Commissioner* v. *Keller's Estate,* 113 F. (2d) 833, 835 (C. C. A. 3d). It was the economic function, and not the formal appearance, of life insurance which Congress desired to promote. Effectuation of its purpose requires, therefore, that the exemption be granted only where decedent's life was actually insured.

This conclusion follows, too, from application of the well-established principle that in tax matters substance rather than form controls. *Weiss* v. *Stearn,* 265 U. S. 242, 254; *United States* v. *Phellis,* 257 U. S. 156, 171, 172; *Gregory* v. *Helvering,* 293 U. S. 465, 469–470; *Helvering* v. *Bashford,* 302 U. S. 454, 458; *Minnesota Tea Co.* v. *Helvering,*

302 U. S. 609, 613–614; *Griffiths* v. *Commissioner,* 308 U. S. 355, 357–358; *Higgins* v. *Smith,* 308 U. S. 473. It would be a clear violation of this principle to grant an exemption simply because an amount is payable in the form of proceeds under a life-insurance policy, where, as here, the policy is, in effect, simply a device to carry out an agreement having no life-insurance feature whatever.

The contrary result reached by the court below is based on the fundamentally erroneous assumption that "the undertakings of the insurance company were obviously intended to be separable and independent" because a "separate application was made for each policy, a separate consideration paid for each, neither policy made reference to the other, and either could have been assigned, and the life policy could have been surrendered, without affecting the insurance company's obligations under the other" (R. 42). We fail to understand how the court below could have concluded that the undertakings of the company were separable and independent when the Board found, and the respondents concede, that the decedent was uninsurable and that the life-insurance policy would not have been issued to her without the annuity. This fact clearly establishes the interdependence of the two undertakings; it makes irrelevant the formal separation of the undertaking into two apparently independent documents, the filing of separate applications and the issuance of separate receipts for each, and the separate treatment of the two policies

by the company for purposes of its reserves and reports. The effective fact is that the company joined the insurance and the annuity features of its agreement with the decedent by refusing to write the insurance without the annuity; the company having insisted that both contracts be made as part of a single agreement, the courts cannot properly treat the contracts as separable for tax purposes.

It is, of course, beyond dispute that separate contracts which form parts of a single transaction must be construed together for tax purposes. The situation is comparable to that presented in cases where a series of different steps is taken in accordance with a preconceived plan to carry out what is essentially a single transaction. Although each step, separately considered, may be effective to create legal rights and obligations as between the parties thereto, it is firmly established that the transaction may not be split up into its component parts for tax purposes. *Pearson* v. *McGraw,* 308 U. S. 313; *Minnesota Tea Co.* v. *Helvering,* 302 U. S. 609; *Helvering* v. *Bashford,* 302 U. S. 454, 458.[5]

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[5] See also: *Starr* v. *Commissioner*, 82 F. (2d) 964 (C. C. A. 4th) certiorari denied, 298 U. S. 680; *Helvering* v. *Elkhorn Coal Co.*, 95 F. (2d) 732 (C. C. A. 4th); *Bassick* v. *Commissioner*, 85 F. (2d) 8 (C. C. A. 2d); *Hendee* v. *Commissioner*, 98 F. (2d) 934 (C. C. A. 7th); *Prairie Oil & Gas Co.* v. *Motter*, 66 F. (2d) 309 (C. C. A. 10th); *Ahles Realty Corp.* v. *Commissioner*, 71 F. (2d) 150 (C. C. A. 2d); *Commissioner* v. *Schumacher Wall Bd. Corp.*, 93 F. (2d) 79 (C. C. A. 9th); *United States* v. *Rodgers*, 94 F. (2d) 666 (C. C. A. 3d); *Miller* v. *Commissioner*, 103 F. (2d) 58 (C. C. A. 6th).

We submit, therefore, that decedent's agreement with the insurance company must be considered in its entirety, that so considered no insurance whatever was involved, and that therefore the insurance exemption provided for in Section 302 (g) is not available to the respondents.[6]

II

THE TRANSFER BY THE DECEDENT TO THE INSURANCE COMPANY IS TAXABLE UNDER SECTION 302 (C) OF THE REVENUE ACT OF 1926

Since decedent's agreement with the insurance company did not involve insurance, it seems clear that the value of the proceeds payable to the beneficiary must be included in decedent's gross estate under Section 302 (c) of the 1926 Act (*infra*, pp. 26–27). This section requires the inclusion in decedent's gross estate of the value of all property to the extent of any interest therein of which the decedent at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at decedent's death. The section further provides that any transfer of a material part of decedent's property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without full consideration, shall,

[6] The general rule that provisions of the Revenue Acts granting exemptions or other favored treatment are to be strictly construed is, of course, applicable. See, *e. g.*, *United States* v. *Stewart*, No. 13, present Term; *Helvering* v. *Northwest Steel Rolling Mills, Inc.*, No. 121, present Term.

unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of the statute. The taxable event is the *inter vivos* transfer by the decedent; the measure of the tax is the value of the property received upon decedent's death. See *Helvering* v. *Hallock,* 309 U. S. 106, 111.

Decedent's agreement with the insurance company plainly involved a transfer by her of a sum of money which decedent contemplated would, upon her death, result in the delivery to her daughter of $25,000. The primary purpose of decedent was to keep her remaining capital undiminished and, upon her death, to pass it intact to her daughter (R. 13, 27). This purpose was fully accomplished in the arrangement with the insurance company; as we have pointed out, the agreement between the parties in effect provided for a stipulated monthly payment to the decedent for life and a payment of $25,000 to decedent's daughter upon decedent's death. Such an agreement, which is comparable in effect to a transfer in trust with a life interest reserved, clearly comes within the language and spirit of Section 302 (c). It is immaterial that the transfer did not involve "the passing of particular items of property directly from the decedent to the transferee"; it is enough that there was a "transfer of property procured through expenditures by the decedent with the purpose, effective at his death, of having it pass to another." *Chase National Bank* v. *United States,* 278 U. S. 327, 337. A contrary

holding would open wide the door to tax avoidance, even without the use of the life insurance form.

This Court recently had occasion to consider Section 302 (c) and in its decision recognized that the broad purpose of the provision is to tax "*inter vivos* transfers that are too much akin to testamentary dispositions not to be subjected to the same excise." *Helvering* v. *Hallock,* 309 U. S. 106, 111–112; see also *Klein* v. *United States,* 283 U. S. 231. Here the record discloses an *inter vivos* transfer intended to pass property to the beneficiary at decedent's death—an arrangement wholly testamentary in character. To hold that such an arrangement does not fall within Section 302 (c) is to give effect to the form of the transaction while ignoring its substance.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
RICHARD H. DEMUTH,
MAURICE J. MAHONEY,
Special Assistants to the Attorney General.

NOVEMBER 1940.

APPENDIX

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and by Sections 401 and 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—
>
> (a) To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;

except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

(d) (1) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

* * * * *

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

* * * * *

[U. S. C., Title 26, Sec. 411.]

Treasury Regulations 80 (1937 ed.):

ART. 13. PROPERTY OF DECEDENT AT TIME OF DEATH.—It is designed by the foregoing provision of the statute that there shall be included in the gross estate all property of the decedent, whether real or personal, tangible or intangible, the beneficial ownership of

which was in the decedent at the time of his death, except real property situated outside the United States.

* * * * * *

ART. 18. TRANSFERS WITH POSSESSION OR ENJOYMENT RETAINED.—(a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, whether in trust or otherwise, made subject to the reservation or retention by the decedent of the use, or the possession, or the rents or other income or enjoyment of the transferred property, or any part thereof, for his life, or for a period not ascertainable without reference to his death, or for such a period as to evidence his intention that it should extend at least for the duration of his life; including also the reservation or retention of the use, possession, rents, or other income the actual enjoyment of which, by the decedent, was to be postponed until the termination of a transferred precedent interest or estate. (See article 15.)

If for any such period the use, possession, rents, or other income (in whole or in part) were to be disposed of in discharge of a legal obligation of the decedent or otherwise for his pecuniary benefit, then to that extent the use, possession, rents, or other income will be treated as having been reserved to or retained by the decedent.

(b) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross

estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10:30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m. eastern standard time, June 6, 1932. See section 506 of the Revenue Act of 1934.

ART. 19. TRANSFERS WITH RIGHT RETAINED TO DESIGNATE WHO SHALL POSSESS OR ENJOY.—

(a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, by trust or otherwise, in connection with which the decedent reserved or retained, either to himself alone or in conjunction with any other person or persons, the right during his life, or for a period not ascertainable without reference to his death, or for such a period as to evidence an intention that the right should continue for at least the duration of his life, to designate the person or persons who should possess or enjoy the transferred property (in whole or in part), or any of the income thereof. (See article 15.)

(b) *Taxability.*—If the transfer was not a bona fide sale for an adequate and full consideration in money or money's worth, the property or the interest or interests therein so transferred shall be included in the gross estate if falling within any one of the following paragraphs:

* * * * *

(3) When the transfer was made and decedent died after the enactment of the Revenue Act of 1932 (5 p. m. eastern standard time, June 6, 1932) and the right to so designate was reserved at the time of the transfer, whether exercisable by decedent

alone or in conjunction with a person or persons having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

As used in this article, the expression "reserved at the time of the transfer" includes any understanding, expressed or implied, had in connection with the making of the transfer that the right to designate the person or persons who should possess or enjoy the property or the income therefrom should later be created or conferred.

ART. 20. TRANSFERS WITH POWER TO CHANGE THE ENJOYMENT—(a) *Transfers included.*—Subdivision (d) of section 302 of the Revenue Act of 1926, as amended, embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See article 15.)

* * * * *

(b) *Taxability.*—The property or the interest or interests therein so transferred shall be included in the gross estate if coming within any one of the following paragraphs:

(1) Regardless of when the transfer was made, if the decedent died after the enactment of the Revenue Act of 1916 (September 8, 1916), and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with

a person or persons having no substantial adverse interest or interests in the transferred property, or if exercisable in conjunction with a person having a substantial adverse interest or with several persons some or all of whom held such an adverse interest, then to the extent of any interest or interests held by a person or persons not required to join in the exercise of the power and any adverse interest which was not substantial.

(2) When the transfer was made after the enactment of the Revenue Act of 1924 (4:01 p. m., eastern standard time, June 2, 1924) and before the amendment of the subdivision by the Revenue Act of 1936 became effective (June 23, 1936), and the decedent's death occurred at any time subsequent to the transfer, and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

* * * * * *

As used in this and in the next succeeding article, the expression "reserved at the time of the transfer" refers to a power which, having been reserved when the transfer was made, continued to the date of decedent's death (see the paragraph next following as to the conditions under which the power will be considered as existent at decedent's death) to be exercisable by decedent alone or by him in conjunction with some other person or persons, and includes any understanding, expressed or implied, had in connection with the making of the transfer

that the power should later be created or conferred.

The power to alter, amend, revoke, or terminate will be considered to have existed on the date of the decedent's death, though the exercise of the power was subject to a precedent giving of notice, or though the alteration, amendment, revocation, or termination would take effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice had been given or the power had been exercised, or though the exercise of the power was restricted to a particular time or the happening of a particular event which had not arrived or occurred at decedent's death. When determining the value of the gross estate in such cases the full value of the property transferred subject to the power should be discounted for the period required to elapse between the date of decedent's death and the date upon which the alteration, amendment, revocation, or termination could take effect. (See article 10 (i) (3)).

* * * * *

ART. 25. TAXABLE INSURANCE.—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (a) All insurance receivable by, or for the benefit of, the estate; (b) all other insurance to the extent that it exceeds in the aggregate $40,000.

The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is considered to have been taken out by the decedent, whether or not he made the application, if he acquired the ownership of, or any legal incident thereof in, the policy; but

in the case of a decedent dying before November 7, 1934 (the date of approval of the 1934 edition of Regulations 80), the provisions of the second paragraph of article 25 of Regulations 70 (1929 edition) will continue to apply. Legal incidents of ownership in the policy include, for example: The right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc.

* * * * * *

ART. 27. INSURANCE RECEIVABLE BY OTHER BENEFICIARIES.—The statute requires the inclusion in the gross estate of the decedent of the proceeds of any policy, or the aggregate proceeds of all policies, not receivable by or for the benefit of decedent's estate, to the extent that such proceeds exceed $40,000, regardless of when the policy was or the policies were issued, if the decedent possessed at the time of his death any of the legal incidents of ownership.

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total, $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in the appropriate schedule of Form 706. The word "beneficiaries", as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 237

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

EDYTH LE GIERSE and BANKERS TRUST COMPANY, as Executors of the Estate of Cecile Le Gierse, Deceased,
Respondents.

Respondents' Brief in Opposition to Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

FREDERICK O. MCKENZIE,
Attorney for Respondents.

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Respondents.

Respondents' Brief in Opposition to Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

This brief is filed in opposition to a petition by Guy T. Helvering, Commissioner of Internal Revenue, for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit seeking the review of a judgment of said Circuit Court of Appeals entered in the above cause on April 13, 1940, affirming the decision of the Board of Tax Appeals.

Opinions Below

The opinion of the Board of Tax Appeals (R. 18-29) is reported in 39 B.T.A. 1134. The opinion of the Circuit

Court of Appeals (R. 72-74) is reported in 110 F. (2d) 734.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 13, 1940 (R. 74). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented

The question presented is whether the proceeds of a life insurance policy taken out by the decedent on her own life are entitled to the estate tax exemption as provided by Section 302(g) of the Revenue Act of 1926, as amended, where the decedent, on the same day, purchased a straight life annuity from the insurance company and where it appears that the life insurance policy would not have been issued to the decedent without the annuity but that the annuity would have been so issued without the life insurance policy.

Statutes and Regulations Involved

The pertinent statutes and regulations involved are set forth in the Appendix to the petition (pp. 7-14).

Statement of Facts

The facts as found by the Board of Tax Appeals are substantially set forth in the petition (pp. 2-4). The complete findings of fact by the Board appear in the record (R. pp. 19-28).

Argument

The respondents recognize that the decision of the court below is substantially in conflict with two other recent decisions in the Circuit Courts of Appeals. *Commissioner* v. *Tyler* (C. C. A. 8th), decided April 29, 1940, not yet officially reported but found in 1940 C. C. H., Vol. 4, Par. 9439, and *Commissioner* v. *Keller* (C. C. A. 3d), decided May 28, 1940, not yet officially reported but found in 1940 C. C. H., Vol. 4, Par. 9494. However, it is submitted that the decision of the court below is eminently sound and that it need not be reviewed. Such decision unanimously affirmed the decision of the Board of Tax Appeals in holding that the proceeds of life insurance in question fall squarely within the exemption provided by Section 302(g) of the Revenue Act of 1926, as amended.

The petitioner would restrict the plain language of the exempting statute. He would qualify the exemption by permitting it to apply to certain types of insurance only. Such does not appear to have been the intention of Congress. A restriction of the exempting statute such as the petitioner urges would consequently necessitate an appropriate amendment by Congress.

Conclusion

For the foregoing reasons the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

FREDERICK O. MCKENZIE,
Attorney for Respondents.

July 25, 1940.

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IN THE

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GUY T. HELVERING, Commissioner of Internal Revenue,
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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

FREDERICK O. MCKENZIE,
Attorney for Respondents.

CHARLES PRATT HEALY,
Of Counsel.

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EDYTH LE GIERSE and BANKERS TRUST COMPANY, as Executors of the Estate of Cecile Le Gierse, Deceased,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

Opinions Below

The opinion of the Board of Tax Appeals (R. 9-17) is reported in 39 B.T.A. 1134. The opinion of the Circuit Court of Appeals (R. 40-42) is reported in 110 F. (2d) 734.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 13, 1940 (R. 43). The petition for a writ of certiorari was filed July 12, 1940, and was granted October 14, 1940 (R. 43). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented

Is the estate tax exemption granted to insurance proceeds by Section 302(g) of the Revenue Act of 1926, as amended, to be denied to the proceeds of a standard form life insurance policy merely because a separate annuity contract was issued as a condition precedent to the issuance of the policy?

Statute and Regulations Involved

The pertinent statutory provisions and regulations will be found in the Appendix, *infra*, pp. 27-34.

Statement of the Case

The findings of fact by the Board of Tax Appeals appear in the Record, pp. 10-16. In contrast to the summary of the facts stated by the Petitioner in his brief (pp. 3-5), the following summary of such findings of fact is submitted.

On December 6, 1935, Cecile Le Gierse, a resident of New York, took out a single premium life insurance policy in the principal sum of $25,000 upon her own life, naming her daughter, Edyth Le Gierse, as the beneficiary. The policy was in the standard form and included all the provisions ordinarily contained in any single premium life insurance policy. The single premium paid for the policy was $22,946. On the same date, the decedent purchased from the same insurance company a single premium life annuity also in the standard form for annuity contracts. The premium for the annuity was $4,179 and entitled the decedent to receive $49.15 per month or $589.80 per year during the remainder of her life (R. 11, 12, 13). The decedent was eighty years of age at the time she entered into these contracts with the insurance company. She was in normal health for a person of that age and at such time had an expectancy under the American Experience Tables of about four or five years (R. 10, 15). No physical examination was required of the decedent by the insurance company prior to the issuance of the insurance policy (R. 13).

The decedent did not enter into these contracts in contemplation of death (R. 16). The main reason therefor was her desire to conserve the principal of her estate and to prevent further shrinkage in a particular part of it, the proceeds from which she used to purchase the two contracts in question. The estate tax situation did, however, come up between the decedent and the life insurance agent (R. 13, 14).

The insurance policy would not have been issued to the decedent without the issuance of the annuity. The annuity, however, would have been issued to the decedent without the issuance of the life insurance policy. In computing the single premium charged for the life insurance

policy, no adjustment was made for the amount charged as premium for the annuity contract. Likewise, in computing the amount charged for the annuity, no adjustment was made for the single premium charged for the insurance policy. Both premiums were the actuarial equivalent of rates charged people of other ages (R. 14, 15). The company treated the two contracts separately and issued a separate receipt to the decedent for each. The company maintains certain reserves for insurance and annuities. The premium paid for the life insurance policy was credited to the insurance reserve and the premium paid for the annuity was credited to the annuity reserve (R. 14). The company is required to report to the State Commissioner of Insurance all insurance policies issued and cancelled, also all annuities issued and cancelled. The two contracts were so reported under the two groups, one under life insurance and the other under annuities (R. 14).

The decedent died on January 1, 1936. On her Estate Tax Return, Form 706, the insurance policy in question was listed, its value was returned at $25,000 but inasmuch as this was the only insurance carried by the decedent, it was reduced by virtue of the exemption to no value. The Commissioner determined that the proceeds of the life insurance policy were not received "as insurance" within the meaning of Section 302(g) of the Revenue Act of 1926 and consequently decedent's estate was not entitled to the $40,000 exemption provided by such section. He thereupon determined a deficiency of $3,875.29. The Board of Tax Appeals reversed this determination, holding that the proceeds of the life insurance policy were received "as insurance" and that the estate was therefore entitled to the exemption (R. 17). The Circuit Court of Appeals for the Second Circuit affirmed the decision of the Board (R. 40, 43).

Summary of Argument

I. The life insurance policy and the annuity were separate, distinct and complete contracts in substance and in form.

II. The fact that the decedent purchased a straight life annuity contract on the same date she purchased the life insurance policy does not affect the status of the latter as life insurance.

III. The instant case is clearly distinguishable from the "deposit arrangement" cases.

IV. The history of the statute indicates no intention on the part of Congress to restrict the exemption to proceeds of certain types of insurance contracts.

V. The contracts in question were entered into by the decedent neither in contemplation of death nor as a plan to evade or even avoid the payment of taxes.

VI. The plain language of the statute granting the exemption to life insurance proceeds should not be limited by implication to insurance issued under certain conditions.

Preliminary Remarks

The Petitioner states in his brief that the Board of Tax Appeals found as a matter of fact that the decedent was "uninsurable," further that the respondents concede that the decedent was "uninsurable" and that the insurance

company considered her "uninsurable." We think that the Petitioner is using the word "uninsurable" in a loose and misleading sense. Since the insurance company *did* issue the insurance policy in question to this decedent, since the Board found as a matter of fact and held as a matter of law that it *was* a life insurance policy, it is begging the question to say the Board found the decedent to be "uninsurable." Of course,, the Respondents *do not* concede that the decedent was uninsurable. By "uninsurable" the Petitioner evidently means that this decedent was not required to pass a physical examination or that she could not have obtained the policy here in question without the annuity, facts which the respondents do concede.

ARGUMENT

POINT I

The Life Insurance Policy and the Annuity Were Separate, Distinct and Complete Contracts in Substance and in Form.

The life insurance policy and the annuity here in question were separate, distinct and complete contracts. A separate application was signed by the decedent for each contract and a separate consideration paid therefor. Each contract was issued on the regular, standard form used by the company. Neither contract referred to the other directly or indirectly, either could have been assigned and the life insurance policy could have been surrendered without affecting the company's liability under the annuity. Going beyond the instruments themselves, we find that the issuing company regarded the transactions as separate and distinct

contracts and upon the issuance thereof they were so reported to the Commissioner of Insurance of the State of Connecticut, as required by law (R. 14, 32). Separate receipts were issued to the decedent by the company covering payment received by it for each contract (R. 14, 30, 31). The consideration, or premium, paid for each contract was computed on an actuarial basis and in accordance with the company's regular schedule of rates. In other words, in computing the single premium charged for the life insurance policy, no adjustment or allowance was made for the annuity premium and in computing the annuity premium, no adjustment or allowance was made for the insurance premium (R. 14, 31). The amount received by the company as a single premium for the insurance policy was credited to its insurance reserve and the amount received by it for the annuity, to its annuity reserve (R. 14, 32). All the legal incidents of ownership enjoyed by the owner of any ordinary life insurance policy were vested in the decedent with respect to the policy here in question and she could have exercised any or all of them without reference to the annuity contract (R. 11-13).

Contractual arrangements entered into at the same time may often be treated as one contract but that is not the case where the parties intend that they be deemed separate and independent contracts. *Williston,* Contracts, 2d Ed. Section 628. The obvious intention of the contracting parties here cannot be ignored. All the evidence points to an intention of the parties to enter into a life insurance and an annuity contract, separate, distinct and independent of each other.

Even where the contracting parties combine all their promises in one document instead of two or more, the cases

hold that if the agreement sets forth separate features, clearly severable, each feature must be given its proper application. *Equitable Life Assurance Society of United States* v. *Deem,* 91 F. (2d) 569, 575 (C. C. A. 4th); *Connecticut General Life Insurance Co.* v. *McClellan,* 94 F. (2d) 445, 446 (C. C. A. 6th); *Downey* v. *German Alliance Insurance Co.,* 252 F. 701, 703, 704 (C. C. A. 4th); *Legg* v. *St. John,* 296 U. S. 489, 490-495; *Bodine* v. *Commissioner,* 103 F. (2d) 982, 985 (C. C. A. 3d).

In *Legg* v. *St. John, supra,* the question before this Court was whether Legg, a voluntary bankrupt, or his trustee was the person entitled to certain future monthly disability benefits payable under a contract entered into between Legg and an insurance company before the adjudication. Several years prior to the adjudication Legg took out a life insurance policy under which the company agreed, in consideration for a stated premium, to pay a certain amount upon his death. By a supplementary contract issued on the same day and attached to the policy, the company, in consideration for an additional annual premium of a stated amount, agreed to pay a monthly benefit of $174.52 upon due proof of total and permanent disability, which latter event happened several years before the adjudication. In holding that the disability benefits were payable to the trustee and not to the bankrupt, Mr. Justice BRANDEIS in the course of his opinion said:

> "Second. The fact that the disability benefits are provided for in a 'Supplementary Contract' issued on the same day as the policy and physically attached thereto does not make them life insurance. The life policy and the contract were executed as distinct instruments. The 'Supplementary Contract' was to operate for some purposes as if a part

> of the life policy. But for all other purposes it is a separate obligation. The hazards covered by the two instruments are obviously different. The beneficiaries differ also. The payment under the life policy was to be made to the wife; the disability benefits are to be paid to Legg himself. A separate and different premium was exacted for the obligations assumed in each instrument. It was provided that forfeiture of the life policy would terminate all rights arising from disability; but the supplementary contract could be terminated by Legg without affecting otherwise his life policy."

In *Bodine* v. *Commissioner, supra,* insurance features and annuity features were contained in one contract but the Court, nevertheless, found that the contract was not only a contract of annuity but that it also possessed the characteristics of a single premium life insurance policy.

The Petitioner cites several cases (p. 22) supporting the proposition that a transaction may not be broken up into its component parts for tax purposes. Typical of such cases is *Pearson* v. *McGraw,* 308 U. S. 313. There the decedent was an Oregon resident. An Illinois trust company held his securities and remitted the income to him. Six months prior to his death he directed the trust company to sell his securities and to purchase Federal Reserve notes with the proceeds. When this was accomplished he transferred the notes by irrevocable trust to the trust company. Under the Oregon statute transfers of intangibles in contemplation of death are subject to the succession tax but the Supreme Court of Oregon held that since the intangibles in question had become tangibles and had acquired a business situs in Illinois, the Federal Constitution prohibited the tax. The decision was reversed by this Court. Mr.

Justice DOUGLAS, in delivering the opinion of the Court, said:

> "The mere sale of the intangibles and the acquisition of the Federal Reserve notes had no functional or business significance apart from the August 15, 1935, transfer (the establishment of the trust). That is emphasized here because they created no legal relations and gave rise to no vested rights interfering with decedent's continuing power of disposition."

It should be noted that in cases of such kind, the separate contract or component step which the taxpayer attempted to isolate had no meaning, no purpose, unless considered with the other contracts or component steps. The obvious purpose for attempting to separate the contracts or component steps in such cases was to evade taxes. The instant case is clearly distinguishable from cases of that sort. Here each contract had its normal, business purpose—each had its own functional significance. Furthermore, in contrast to cases of the type of *Pearson* v. *McGraw, supra*, it cannot be claimed here that the decedent entered into the separate insurance contract for the purpose of evading taxes (*infra*, p. 23).

Whatever these two contracts may be called and regardless of what other benefits were provided thereby, the sum of $25,000 which was paid to the beneficiary is the only sum here sought to be taxed. The beneficiary's right to receive such sum from the company was derived solely from the company's promise contained within the four corners of the contract designated as the life insurance policy and such right was dependent upon nothing else for its enforcement.

The Petitioner suggests (p. 17) that the parties may have accomplished the same result by calling in a scrivener

to draft a simple contract which would have provided merely for the transfer of $27,125 by the decedent to the company in return for its promise to pay her $589.80 annually during her life and upon her death to pay her daughter $25,000. We cannot assume, however, that the decedent would have been satisfied with such bare provisions. We cannot assume, for example, that she would have waived the incontestability clause or the rights reserved to her to change the beneficiary, to assign the policy, to borrow upon it, or to surrender it for its cash value. The scrivener would have had to be able to compute the table of cash or loan values, a very important item in any life insurance policy. If all these provisions were so included by the scrivener we would have the essential elements of a life insurance policy. The annuity provisions may have been added but since they impose entirely different obligations on the company, the recitation of a separate and distinct consideration would have been necessary. However, there is a very practical reason why the insurance company here would not have desired to execute one contract including both the insurance and the annuity features. Under Section 187 of the Tax Law of New York (Consolidated Laws of New York c. 60), a franchise tax is levied on insurance corporations based on the premiums received "on all policies, certificates, renewals, policies subsequently cancelled, insurance and re-insurance." In *People* v. *Knapp,* 193 App. Div. 413, 416, it was held that the tax imposed by such section does not apply to premiums paid for annuity contracts. Consequently, if the two contracts here in question had been consolidated into one, it would have been necessary for the company, after receiving payment, to allocate part of same to the insurance premium for calculation of the tax.

POINT II

The Fact That the Decedent Purchased a Straight Life Annuity Contract on the Same Date She Purchased the Life Insurance Policy Does Not Affect the Status of the Latter as Life Insurance.

Despite the distinguishing and severable features of the two contracts, the Petitioner contends that the life insurance policy lost its identity completely because of the issuance of the annuity—that the decedent received neither an insurance policy nor an annuity but instead, some sort of "investment contract" (Petitioner's brief, pp. 17-18).

In the first place, it should be noted that the Connecticut General Life Insurance Company has no power to issue "investment contracts." Under its charter, it is permitted to issue insurance contracts and annuities (R. 32-33). If the contractual arrangement between the parties here lacks the essential elements of life insurance as the Petitioner contends, then the company has issued an *ultra vires* contract. This should not be readily presumed.

Contracts executed as a condition precedent to, or in conjunction with, other contracts are commonplace in business transactions. A bond does not lose its identity because it is executed in conjunction with a mortgage. Preferred stock does not lose its identity because it is purchased in conjunction with common stock or as a condition precedent to the purchase of common stock. A health insurance policy does not lose its identity because the issuing company may require that an accident policy be taken out with it. If collateral in the form of a mortgage on real estate is found to be worthless because of a defective title, could it be argued that the holder of the bond issued in conjunction with the mortgage has no recourse thereon? With

respect to the issuance of the annuity as a condition precedent to the issuance of the life insurance policy here in question, we think that the Court below covered the point succinctly when it said (R. 42):

> "The fact that she could not have gotten that policy unless she had also bought an annuity contract *does not change the character of what she got.*" [Italics supplied.]

The petitioner completely ignores the severable features of the two contracts above described and speaks of "the transfer of $27,125 by the decedent to the company" in return for the company's agreement to pay decedent $589.80 annually and to pay her daughter $25,000 upon her death. It is immediately obvious why the Petitioner wishes to have these two contracts treated as one indivisible contract. Since the decedent's age and the fact that she was not required to take a physical examination are in no way material to the issues here involved, the Petitioner must seek other grounds on which to contend that the insurance policy here was not really life insurance. So he contends that because of the issuance of the annuity, the element of "insurance risk" was eliminated and that the two contracts thereby became one "investment contract."

We would hesitate to accept any definition of the oft-used term "insurance risk." To understand all of the risks involved in the complicated business of selling insurance at a profit would require a detailed study into the various ramifications of insurance underwriting. Where insurance risk leaves off and investment risk begins is also difficult to determine. For example, we know that the investment element is of minor consideration in the low premium term contract, whereas it becomes a very important factor in the costly single premium endowment contract. Mr. Joyce, the company's actuary, stated that the

annuity here may have reduced the risk but it did not eliminate it—it merely relieved the "underwriting problem as you normally think of it" (R. 33-34).

Regarding the two contracts as one transaction for the purpose of this line of argument, it is submitted that it *was* possible for the company to have sustained a loss on the business of writing these contracts and that such possibility existed when the contracts were issued. For example, if the decedent lived, and at the end of one year had surrendered the insurance policy for its cash surrender value, she would have received the sum of $19,550 (R. 13). Without attempting to compute exactly how much would then be left in the hands of the company from the total premiums paid to it on both contracts, it is apparent that the annual annuity payment of $589.80 would be more than the company could possibly earn on such remaining funds. Consequently, it is quite evident that within a few years the company would have to draw on its general funds in order to meet its obligations under the annuity. In other words, if the decedent had surrendered her life insurance policy at the end of the first year, *a loss or a gain to the company on the two contracts would depend almost entirely on how long the decedent lived thereafter.* The possibility of such a loss under such circumstances clearly existed at the time the two contracts were issued.[1]

---

[1] The Petitioner anticipates this point in his brief (footnote p. 16) by attempting to show that although the risk of loss may have existed under such circumstances, it was remote. His calculations are inaccurate in that he makes no allowance for the expenses incurred by the company in issuing these contracts. The exact amount of such expenses or "loading charge" was not revealed by the evidence but such loading charge was, of course, incurred (R. 35).

The Petitioner further argues that such a risk of loss would spring from the annuity rather than from the insurance policy. His position is apparently inconsistent. For the purpose of showing a lack of insurance risk, it is necessary for him to treat the transaction as one contract and lump the two premiums together but for the purpose of minimizing the illustrated risk he would treat such risk as springing from the existence of the annuity.

Here is the crux of the matter. All insurance is a matter of balancing or averaging of risk. Over a given period the premium rates must be so calculated that the company is virtually assured of taking in more than it pays out. This balancing of risk can be accomplished in a variety of ways and the process of accomplishing it is often called "underwriting." The fact that in this case the company sought to underwrite the risk by different means than it ordinarily used in underwriting life insurance policies—*i. e.*, in a manner different than "you normally think of it" does not make the policy of life insurance issued to the decedent something other than life insurance. There is nothing in the exempting statute which requires that the insurance proceeds be receivable from a particular kind of life insurance contract, or that the policy in question be written in any particular way or conform to any particular standard, or that it be issued only after a physical examination of the insured, or that it be written according to any specific group of underwriting principles. The statute does not preclude the exemption on any of these grounds, and expresses no concern with any action the insurance company may take to relieve its underwriting problems or to minimize the risk in particular cases. If Congress had intended that the exemption should depend on conformity to a particular standard, it would have so provided. It did not. On the contrary, it used the broadest language in exempting amounts (not in excess of $40,000) "receivable * * * as insurance under policies taken out by the decedent upon his own life" (Appendix, *infra*, p. 28). The Treasury Regulations (*infra*, p. 33) are equally broad, stating "the term 'insurance' refers to life insurance of every description * * *."

From a standpoint of underwriting, the reason the insurance company here would not have issued the life in-

surance policy to the decedent without the annuity was not because of her advanced age, not because she did not pass a physical examination but because it would have been difficult to get a sufficient number of persons of her age to apply for similar policies and thus be brought into the broad average for underwriting purposes. In writing group insurance the company is able to waive a physical examination because of the existence of similar policies issued to persons subjected to similar employment risks. Aside from group insurance, if a sufficient number of persons could be brought into a particular class the company would not necessarily require a physical examination (R. 36, 37). Since it was impractical to sell insurance to a large class of the age of the decedent, the company accepted in lieu of a physical examination the issuance of the life annuity.

In Petitioner's brief (pp. 19-20) he states:

> "It follows that in every case where the aggregate amount paid for the annuity and insurance policies equals or exceeds the face amount of the insurance policy, and where the return on that amount to the insurance company equals or exceeds the annual annuity payments, there is no shifting of any risk of loss and consequently no element of insurance."

In other words the Petitioner contends that regardless of age or physical condition and regardless of whether or not the annuity is issued as a condition precedent to the issuance of the policy, if the two are issued in conjunction, no element of life insurance exists. Thus, the Petitioner would argue that if this decedent had been *fifty* years of age instead of *eighty* and had voluntarily purchased the annuity along with the policy, she would have received neither

a life insurance policy nor an annuity but would have received instead one "investment contract."

We do not think that insurance policies purchased simultaneously with annuities should be treated as "*inter vivos* transfers that are too much akin to testamentary dispositions not to be subjected to the same excise." There is no indication whatever that such was the intention of Congress in enacting Section 302(c) or Section 302(g). Nor, do we see how it can be seriously contended that the decisions of this Court in *Helvering* v. *Hallock*, 309 U. S. 106, and *Klein* v. *United States*, 283 U. S. 231 (Petitioner's brief, p. 25) are applicable to the insurance situation presented here.

The Petitioner argues further (p. 17) that the decedent had no insurance purpose in entering into these contracts—that it was only an investment purpose. What is the motive or purpose of life insurance? Apparently, the Petitioner feels that insurance taken out by a wealthy person who has already provided for his family is not life insurance. On page 20 of his brief, he states:

> "The purpose of the exemption was to encourage the institution of life insurance as 'the least costly and most equitable device yet evolved to preserve families in a wage-earning society from destitution'."*

This amounts to a contention that a life insurance contract in which savings or investment features are emphasized, or one which is effected primarily for investment purposes, such as providing a fund for the payment of taxes, is not life insurance. The contention is manifestly absurd. Most forms of life insurance provide some sort of cash value

* Matter in single quotation from opinion in *Commissioner* v. *Keller's Estate*, 113 F. (2d) 833, 835 (C. C. A. 3d), No. 371, present Term.

which is in itself an investment feature. Furthermore, it is common knowledge that life insurance is frequently purchased for investment purposes.

The contract in question presents the essential requisites of life insurance. For a stipulated consideration the company undertook to indemnify the beneficiary against loss by a specified contingency, peril or risk. That contingency was the death of the insured, this decedent. *And the death of the decedent was the sole contingency for the payment of the principal amount of the policy.* Clearly, therefore, the proceeds here sought to be taxed were the proceeds of a life insurance contract. The fact that an annuity contract imposing entirely different obligations on the company was issued at the same time does not make the life insurance contract something other than life insurance.

POINT III

The Instant Case Is Clearly Distinguishable From the "Deposit Arrangement" Cases.

The Petitioner contends (footnote p. 11) that the decision of the Court below is in substantial conflict with *Old Colony Trust Company* v. *Commissioner*, 102 F. (2d) 380 (C. C. A. 1st). This case involves one of the so-called "deposit arrangement" situations. In such cases the "insured" is given the right to withdraw the entire principal amount of the "policy" at any time. In the *Old Colony* case, for example, the entire agreement between the decedent and the insurance company was contained in a single contract. The term "life insurance" was not mentioned. In fact, the contract was designated on its face "Life

Annuity With Principal Sum Payable At Death." The consideration paid by the decedent for such contract was $42,000, the face amount of which was $40,000. The annuity payable to the decedent was computed on the basis of 3½% on the principal amount and such principal amount was payable either to the beneficiaries named in the contract, or to the decedent upon demand. It was held that the proceeds were not entitled to the exemption provided for life insurance proceeds under Section 302(g). In *State ex rel. Thornton* v. *Probate Court,* 186 Minn. 351, also cited by Petitioner (footnote p. 11) a similar situation prevailed. There the decedent deposited $30,000 with each of three insurance companies. Each company agreed to pay him approximately 3% annually of such amount and to allow him a participation in the earnings of the company. *But in each contract the decedent was given the right to withdraw the entire principal amount of $30,000 at any time.* In holding that the contracts were not life insurance policies the Court observed that the funds in question were subject to the same use, disposal and control by the decedent as if he had deposited them in a bank under a similar contract.

In the instant case, the decedent could not have withdrawn the face amount of the life insurance policy, $25,000, under any circumstances. *Her death was the sole contingency for the payment of such amount.* During her life all she could get under the insurance policy was its cash surrender or loan value as in the case of any ordinary life insurance policy. Furthermore, in the instant case, the monthly payments promised to the decedent bore no resemblance to interest. If she had surrendered the life insurance contract as she had a right to do, the company still would have been obligated to pay her an income of $49.15

per month under the terms of the annuity contract. These payments certainly could not then be regarded as interest on the total consideration paid, because the greater portion of that would have been disbursed as a cash surrender value. To so regard them would result in an "interest rate" far in excess of what the company could earn on the funds then in its hands. Clearly, therefore, the monthly payments promised to the decedent were not interest but true annuity payments.

There is no quarrel here with the decisions reached in the *Old Colony Trust Company* and *Thornton* cases, *supra,* and other cases involving a mere "deposit arrangement." *In none of those cases was death the sole contingency for the payment of the principal amount.* That death *was* the sole contingency for such payment here is undisputed.

POINT IV

The History of the Statute Indicates No Intention on the Part of Congress to Restrict the Exemption to Proceeds of Certain Types of Insurance Contracts.

Since the Petitioner has dwelt considerably on the purpose of the exemption accorded to life insurance proceeds and the intention of Congress with respect thereto, it may be well to examine briefly the history of the exempting statute. Prior to the Revenue Act of 1918, there was no statutory provision for the taxation of life insurance proceeds. Until such time proceeds payable to the executor of an estate were considered subject to estate taxes within the meaning of Section 202(a) of the Revenue Act of 1916 (39 Stat. 777). This Section contained a qualifying

clause to the effect that the property to be included in the gross estate must be subject to the payment of charges against the estate, to the payment of expenses of administration and to distribution as part of the estate. By the enactment of Section 402(f) of the Revenue Act of 1918 (40 Stat. 1098) Congress specifically provided that insurance receivable by the executor and also to the extent of the excess over $40,000 of the amount receivable as insurance by all other beneficiaries should be included in the gross estate of the decedent. The language used in that section has not been changed. In the report of the Ways and Means Committee on this bill (House Report 767, 65th Congress, 2d Session), which bill later became the Revenue Act of 1918, the Committee said at page 22:

> "The gross estate section has been amended to specifically include (1) insurance receivable by the executor under policies taken out by the decedent upon his own life and (2) insurance in excess of $40,000 receivable by all specific beneficiaries under policies taken out by the decedent upon his own life. (1) Insurance payable to the executor or to the estate is now regarded as falling within Sec. 202(a) of the existing statute and this construction of the existing statute is now written into the new bill for the sake of clearness. The amendment will serve the further purpose of putting on notice those who acquaint themselves with the statute for the purpose of making more definite plans for the disposition of their property. (2) The provision with respect to the specific beneficiaries has been included for the reason that insurance payable to such beneficiaries usually passes under a contract to which the insurance company and the individual beneficiary are the parties in interest and over which the executor exercises no control. Amounts passing in this way are not liable for the expenses of administra-

> tion or debts of the decedent and therefore do not fall within the existing provisions defining the gross estate. It has been brought to the attention of the committee that wealthy persons have and now anticipate resorting to this method of defeating the estate tax. Agents of insurance companies have openly urged persons of wealth to take out additional insurance payable to specific beneficiaries for the reason that such insurance would not be included in the gross estate. A liberal exemption of $40,000 has been included and it seems not unreasonable to require the inclusion of amounts in excess of this sum."

An identical statement is contained in report No. 617 of the Senate Finance Committee, 65th Congress, 3rd Session, page 42.

It is apparent from an examination of the above reports that Congress had no intention of denying the exemption to proceeds of life insurance contracts taken out primarily for investment purposes. On the other hand, it was plainly the intention of Congress to permit persons of wealth to take advantage of the exemption as well as wage-earners. In other words the exemption was enacted with the full knowledge that it *might* be utilized by *any* person to whom it was available. Furthermore, there is no indication in the above reports that Congress intended the exemption to apply to particular types of insurance or to insurance issued under certain conditions.

POINT V.

The Contracts in Question Were Entered Into by the Decedent Neither in Contemplation of Death Nor as a Plan to Evade or Even Avoid the Payment of Taxes.

The Board of Tax Appeals found as a matter of fact and held as a matter of law that the proceeds here in question were received by the beneficiary "as insurance" within the meaning of the exempting statute. Consequently, there was no need for the Board to find as a matter of fact that the contracts in question were not entered into by the decedent in contemplation of death. However, it did so find (R. 16). Such finding was supported by substantial evidence and should not be disturbed on review. *Colorado National Bank* v. *Commissioner,* 305 U. S. 23, 27; *Helvering* v. *Rankin,* 295 U. S. 123, 131.

The record clearly indicates the primary purpose of the decedent in purchasing this insurance (R. 27, 29). In 1935, she had certain securities which were then worth approximately $25,000. A few years prior thereto, these securities had been worth about $100 000 (R. 27). As the income from such securities was very small, she decided to prevent further shrinkage in this particular part of her estate by selling the securities and investing the proceeds in these contracts. Naturally, "the estate tax situation came up" (R. 29) but the evidence is clear and the Board of Tax Appeals so found that such was not a primary consideration. Such finding should not be disturbed. *Colorado National Bank* v. *Commissioner, supra; Helvering* v. *Rankin, supra.* Even if decedent's primary motive in purchasing the insurance had been to reduce her gross estate, such would not make the

transaction a tax evasion scheme or "device." Congress specifically permitted such avoidance of taxes, if such it be, by granting the exemption to life insurance proceeds. As the Court below said (R. 42):

> "There is no suggestion in the statute that the exemption is to be denied if the insured's motive in buying the insurance is to reduce the gross estate he may leave at death."

We submit that the purchase of a single premium life insurance policy is not a "transfer" within the meaning of any of the provisions of Section 302(c) of the Revenue Act of 1926. If such is true we do not believe that the proceeds of the single premium life insurance policy here in question should be deprived of the exemption provided by Section 302(g) merely because a separate, distinct and completely different contract was issued by the company as a condition precedent to the issuance of the policy.

POINT VI

The Plain Language of the Statute Granting the Exemption to Life Insurance Proceeds Should Not Be Limited by Implication to Insurance Issued Under Certain Conditions.

This Court has repeatedly stated that in the operation of tax statutes, burdens should not be imposed upon taxpayers beyond what the statutes expressly and clearly provide. *Gould* v. *Gould,* 245 U. S. 151, 153; *United States* v. *Merriam,* 263 U. S. 179, 187-188; *Burnet* v. *Niagara Brewing Co.,* 282 U. S. 648, 654.

In *Gould* v. *Gould, supra,* Mr. Justice McReynolds, delivering the opinion of this Court, said at page 153:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication, beyond the clear import of the language used, *or to enlarge their operations so as to embrace matters not specifically pointed out.* In case of doubt they are construed most strongly against the government, and in favor of the citizen." (Italics supplied.)

In *U. S.* v. *Merriam, supra,* Mr. Justice SUTHERLAND, in delivering the opinion of this Court, said at pages 187-188:

> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer."

Despite the Petitioner's theories as to the measure of "insurance risk" in certain cases and the "economic function" of insurance, the sole question remains: Is the estate tax exemption granted to insurance by Section 302(g) to be denied to the proceeds of a standard form life insurance policy *merely because a separate annuity contract was issued as a condition precedent to the issuance of the policy?* To so deny the exemption would be to read into the statute a condition which does not there exist. If it is deemed necessary or expedient to limit the exemption to proceeds of particular types of insurance or to insurance issued under certain conditions, that should be done by Congressional

amendment. Until such time, taxpayers, *the wealthy as well as the wage-earners,* should be entitled to rely upon the plain and unequivocal wording of the statute.

CONCLUSION

The decision of the Court below should be affirmed.

Respectfully submitted,

FREDERICK O. MCKENZIE,
Attorney for Respondents.

CHARLES PRATT HEALY,
Of Counsel.

December 10, 1940.

APPENDIX

Statute and Regulations Involved

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 803(a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and by Sections 401 and 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680:

> Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States——
>
> (a) To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of

a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

(d) (1) To the exent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

* * * * * * *

(g) To the exent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

* * * * * * *

[U. S. C., Title 26, Sec. 411.]

Treasury Regulations 80 (1937 ed.):

ART. 13. PROPERTY OF DECEDENT AT TIME OF DEATH.—It is designed by the foregoing provision of the statute that there shall be included in the gross estate all property of the decedent, whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of his death, except real property situated outside the United States.

* * * * * * *

ART. 18. TRANSFERS WITH POSSESSION OR ENJOYMENT RETAINED.—(a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, whether in trust or otherwise, made subject to the reservation or retention by the decedent of the use, or the possession, or the rents or other income or enjoyment of the transferred property, or any part thereof, for his life, or for a period not ascertainable without reference to his death, or for such a period as to evidence his intention that it should extend at least for the duration of his life; including also the reservation or retention of the use, possession, rents, or other income the actual enjoyment of which, by the decedent, was to be postponed until the termination of a transferred precedent interest or estate. (See article 15.)

If for any such period the use, possession, rents, or other income (in whole or in part) were to be disposed of in discharge of a legal obligation of the decedent or otherwise for his pecuniary benefit, then to that extent the use, possession, rents, or other income will be treated as having been reserved to or retained by the decedent.

(b) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10:30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m. eastern standard time, June 6, 1932. See section 506 of the Revenue Act of 1934.

ART. 19. TRANSFERS WITH RIGHT RETAINED TO DESIGNATE WHO SHALL POSSESS OR ENJOY.—(a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, by trust or otherwise, in connection with which the decedent reserved or retained, either to himself alone or in conjunction with any other person or persons, the right during his life, or for a period not ascertainable without reference to his death, or for such a period as to evidence an intention that the right should continue for at least the duration of his life, to designate the person or persons who should possess or enjoy the transferred property (in whole or in part), or any of the income thereof. (See article 15.)

(b) *Taxability.*—If the transfer was not a bona fide sale for an adequate and full consideration in money or money's worth, the property or the interest or interests therein so transferred shall be included in the gross estate if falling within any one of the following paragraphs:

* * * * * * *

(3) When the transfer was made and decedent died after the enactment of the Revenue Act of 1932 (5 p. m. eastern standard time, June 6, 1932) and the right to so designate was reserved at the time of the transfer, whether exercisable by decedent alone or in conjunction with a person or persons having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

As used in this article, the expression "reserved at the time of the transfer" includes any understanding, expressed or implied, had in connection with the making of the transfer that the right to designate the person or persons who should possess or enjoy

the property or the income therefrom should later be created or conferred.

ART. 20. TRANSFERS WITH POWER TO CHANGE THE ENJOYMENT — (a) *Transfers included.*—Subdivision (d) of section 302 of the Revenue Act of 1926, as amended, embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See article 15.)

* * * * * * *

(b) *Taxability.*—The property or the interest or interests therein so transferred shall be included in the gross estate if coming within any one of the following paragraphs:

(1) Regardless of when the transfer was made, if the decedent died after the enactment of the Revenue Act of 1916 (September 8, 1916), and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with a person or persons having no substantial adverse interest or interests in the transferred property, or if exercisable in conjunction with a person having a substantial adverse interest or with several persons some or all of whom held such an adverse interest, then to the extent of any interest or interests held by a person or persons not required to join in the exercise of the power and any adverse interest which was not substantial.

(2) When the transfer was made after the enactment of the Revenue Act of 1924 (4:01 p. m., eastern standard time, June 2, 1924) and before the amend-

ment of the subdivision by the Revenue Act of 1936 became effective (June 23, 1936), and the decedent's death occurred at any time subsequent to the transfer, and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

* * * * * * *

As used in this and in the next succeeding article, the expression "reserved at the time of the transfer" refers to a power which, having been reserved when the transfer was made, continued to the date of decedent's death (see the paragraph next following as to the conditions under which the power will be considered as existent at decedent's death) to be exercisable by decedent alone or by him in conjunction with some other person or persons, and includes any understanding, expressed or implied, had in connection with the making of the transfer that the power should later be created or conferred.

The power to alter, amend, revoke, or terminate will be considered to have existed on the date of the decedent's death, though the exercise of the power was subject to a precedent giving of notice, or though the alteration, amendment, revocation, or termination would take effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice had been given or the power had been exercised, or though the exercise of the power was restricted to a particular time or the happening of a particular event which had not arrived or occurred at decedent's death. When determining the value of the gross estate in such cases the full value of the

property transferred subject to the power should be discounted for the period required to elapse between the date of decedent's death and the date upon which the alteration, amendment, revocation, or termination could take effect. (See article 10 (i) (3).)

* * * * * * *

ART. 25. TAXABLE INSURANCE.—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (a) All insurance receivable by, or for the benefit of, the estate; (b) all other insurance to the extent that it exceeds in the aggregate $40,000.

The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is considered to have been taken out by the decedent, whether or not he made the application, if he acquired the ownership of, or any legal incident thereof in, the policy; but in the case of a decedent dying before November 7, 1934 (the date of approval of the 1934 edition of Regulatons 80), the provisions of the second paragraph of article 25 of Regulations 70 (1929 edition) will continue to apply. Legal incidents of ownership in the policy include, for example: The right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc.

* * * * * * *

ART. 27. INSURANCE RECEIVABLE BY OTHER BENEFICIARIES.—The statute requires the inclusion in the gross estate of the decedent of the proceeds of any policy, or the aggregate proceeds of all policies, not receivable by or for the benefit of decedent's estate, to the extent that such proceeds exceed $40,000, re-

gardless of when the policy was or the policies were issued, if the decedent possessed at the time of his death any of the legal incidents of ownership.

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total, $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in the appropriate schedule of Form 706. The word "beneficiaries," as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

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SUPREME COURT OF THE UNITED STATES.

No. 237.—October Term, 1940.

Guy T. Helvering, Petitioner, *vs.* Edyth Le Gierse and Bankers Trust Co., Respondents. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 3, 1941.]

Mr. Justice Murphy delivered the opinion of the Court.

Less than a month before her death in 1936, decedent, at the age of 80, executed two contracts with the Connecticut General Life Insurance Co. One was an annuity contract in standard form entitling decedent to annual payments of $589.80 as long as she lived. The consideration stated for this contract was $4,179. The other contract was called a "Single Premium Life Policy—Non Participating" and provided for a payment of $25,000 to decedent's daughter, respondent Le Gierse, at decedent's death. The premium specified was $22,946. Decedent paid the total consideration, $27,125, at the time the contracts were executed. She was not required to pass a physical examination or to answer the questions a woman applicant normally must answer.

The "insurance" policy would not have been issued without the annuity contract, but in all formal respects the two were treated as distinct transactions. Neither contract referred to the other. Independent applications were filed for each. Neither premium was computed with reference to the other. Premium payments were reported separately and entered in different accounts on the company's books. Separate reserves were maintained for insurance and annuities. Each contract was in standard form. The "insurance" policy contained the usual provisions for surrender, assignment, optional modes of settlement, etc.

Upon decedent's death, the face value of the "insurance" contract became payable to respondent Le Gierse, the beneficiary. Thereafter, a federal estate tax return was filed which excluded from decedent's gross estate the proceeds of the "insurance"

policy. The Commissioner notified respondents Bankers Trust Co. and Le Gierse, as executors of decedent's estate, that he proposed to include the proceeds of this policy in the gross estate and to assess a deficiency. Suit in the Board of Tax Appeals followed, and the Commissioner's action was reversed. 39 B. T. A. 1134. The Circuit Court of Appeals affirmed. 110 F. (2d) 734. We brought the case here because of conflict with *Commissioner v. Keller,* 113 F. (2d) 833, and *Helvering* v. *Tyler,* 111 F. (2d) 422. 311 U. S. —.

The ultimate question is whether the "insurance" proceeds may be included in decedent's gross estate.

Section 302 of the Revenue Act of 1926 (44 Stat. 9, 70; as amended, 47 Stat. 169, 279; 48 Stat. 680, 752) provides: "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible . . . —(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40 000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life." Thus the basic question is whether the amounts received here are amounts "receivable as insurance" within the meaning of § 302(g).

Conventional aids to construction are of little assistance here. Section 302(g) first appeared in identical language in the Revenue Act of 1918 as § 402(f). 40 Stat. 1057, 1098. It has never been changed.[1] None of the acts has ever defined "insurance". Treasury Regulations, interpreting the original provision, stated simply: "The term 'insurance' refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system." Treasury Regulations No. 37, 1921 edition, p. 23. This statement has never been amplified.[2] The committee report accompanying the Revenue Act of 1918 merely noted that the provision taxing insurance receiv-

[1] Act of 1921: 42 Stat. 227, 279; Act of 1924: 43 Stat. 253, 305; Act of 1926: 44 Stat. 9, 71; Code of 1939: 53 Stat. 1, 122.

[2] Regulations No. 63, p. 26; Regulations No. 68, p. 31; Regulations No. 70, 1926 edition, p. 30; Regulations No. 70, 1929 edition, p. 33; Regulations No. 80, p. 62.

able by the executor clarified existing law, and that the provision taxing insurance in excess of $40,000 receivable by specific beneficiaries was inserted to prevent tax evasion. House Report No. 767, 65th Cong., 2d Sess., p. 22.[3] Subsequent committee reports do not mention § 302(g). Transcripts of committee hearings in 1918 and since are equally unimformative.[4]

Necessarily, then, the language and the apparent purpose of § 302(g) are virtually the only bases for determining what Congress intended to bring within the scope of the phrase "receivable as insurance". In fact, in using the term "insurance" Congress has identified the characteristic that determines what transactions are entitled to the partial exemption of § 302(g).

We think the fair import of subsection (g) is that the amounts must be received as the result of a transaction which involved an actual "insurance risk" at the time the transaction was executed. Historically and commonly insurance involves risk-shifting and risk-distributing. That life insurance is desirable from an economic and social standpoint as a device to shift and distribute risk of loss from premature death is unquestionable. That these elements of risk-shifting and risk-distributing are essential to a life insurance contract is agreed by courts and commentators. See for example: *Ritter* v. *Mutual Life Ins. Co.*, 169 U. S. 139; *In re Walsh*, 19 F. Supp. 567; *Guaranty Trust Co.* v. *Commissioner*, 16 B. T. A. 314; *Ackerman* v. *Commissioner*, 15 B. T. A. 635; Couch, Cyclopedia of Insurance, Vol. I, § 61; Vance, Insurance, §§ 1-3; Cooley, Briefs on Insurance, 2d edition, Vol. I, p. 114; Huebner, Life Insurance, Ch. 1. Accordingly, it is logical to assume that when Congress used the words "receivable as insur-

[3] " . . . [Insurance payable to specific beneficiaries does] not fall within the existing provisions defining gross estate. It has been brought to the attention of the committee that wealthy persons have and now anticipate resorting to this method of defeating the estate tax. Agents of insurance companies have openly urged persons of wealth to take out additional insurance payable to specific beneficiaries for the reason that such insurance would not be included in the gross estate. A liberal exemption of $40,000 has been included and it seems not unreasonable to require the inclusion of amounts in excess of this sum." *Id.*, p. 22.

The same comment appears in Senate Report No. 617, 65th Cong., 3d Sess., p. 42.

[4] The curious consistency and inadequacy of section 302(g) have not escaped notice. See Paul, Life Insurance and The Federal Estate Tax, 52 Har. L. Rev. 1037; Paul, Studies in Federal Taxation, 3d Series, p. 351; United States Trust Co. *v.* Sears, 29 F. Supp. 643, 650.

ance'' in § 302(g), it contemplated amounts received pursuant to a transaction possessing these features. *Commissioner* v. *Keller, supra; Helvering* v. *Tyler, supra; Old Colony Trust Co.* v. *Commissioner,* 102 F. (2d) 380; *Ackerman* v. *Commissioner, supra.*

Analysis of the apparent purpose of the partial exemption granted in § 302(g) strengthens the assumption that Congress used the word ''insurance'' in its commonly accepted sense. Implicit in this provision is acknowledgement of the fact that usually insurance payable to specific beneficiaries is designed to shift to a group of individuals the risk of premature death of the one upon whom the beneficiaries are dependent for support. Indeed, the pith of the exemption is particular protection of contracts and their proceeds intended to guard against just such a risk. See *Commissioner* v. *Keller, supra; United States Trust Co.* v. *Sears,* 29 F. Supp. 643; Hughes, Federal Death Tax, p. 91; Comment, 38 Mich. L. Rev. 526, 528; compare *Chase National Bank* v. *United States,* 28 F. Supp. 947; *In re Walsh, supra; Moskowitz* v. *Davis,* 68 F. (2d) 818. Hence, the next question is whether the transaction in suit in fact involved an ''insurance risk'' as outlined above.

We cannot find such an insurance risk in the contracts between decedent and the insurance company.

The two contracts must be considered together. To say they are distinct transactions is to ignore actuality, for it is conceded on all sides and was found as a fact by the Board of Tax Appeals that the ''insurance'' policy would not have been issued without the annuity contract. Failure, even studious failure, in one contract to refer to the other cannot be controlling. Moreover, authority for such consideration is not wanting, however unrealistic the distinction between form and substance may be. *Commissioner* v. *Keller, supra; Helvering* v. *Tyler, supra.* See Williston, Contracts, Vol. III, § 628; Paul, Studies in Federal Taxation, 2d series, p. 218; compare *Pearson* v. *McGraw,* 308 U. S. 313.[5]

Considered together, the contracts wholly fail to spell out any element of insurance risk. It is true that the ''insurance'' contract looks like an insurance policy, contains all the usual provisions of

[5] Legg *v.* St. John, 296 U. S. 489, is not to the contrary. There nothing indicated that the one contract would not have been issued without the other; there was no necessary connection between the two.

one, and could have been assigned or surrendered without the annuity. Certainly the mere presence of the customary provisions does not create risk, and the fact that the policy could have been assigned is immaterial since no matter who held the policy and the annuity, the two contracts, relating to the life of the one to whom they were originally isued, still counteracted each other. It may well be true that if enough people of decedent's age wanted such a policy it would be issued without the annuity, or that if the instant policy had been surrendered a risk would have arisen. In either event the essential relation between the two parties would be different from what it is here. The fact remains that annuity and insurance are opposites; in this combination the one neutralizes the risk customarily inherent in the other. From the company's viewpoint, insurance looks to longevity, annuity to transiency. See *Commissioner* v. *Keller, supra; Helvering* v. *Tyler, supra; Old Colony Trust Co.* v. *Commissioner, supra; Carroll* v. *Equitable Life Assur. Soc.*, 9 F. Supp. 223; Note, 49 Yale L. J. 946; Cohen, Annuities and Transfer Taxes, 7 Kan. B. A. J. 139.

Here the total consideration was prepaid and exceeded the face value of the "insurance" policy. The excess financed loading and other incidental charges. Any risk that the prepayment would earn less than the amount paid to respondent as an annuity was an investment risk similar to the risk assumed by a bank; it was not an insurance risk as explained above. It follows that the sums payable to a specific beneficiary here are not within the scope of § 302(g). The only remaining question is whether they are taxable.

We hold that they are taxable under § 302(c) of the Revenue Act of 1926, as amended, as a transfer to take effect in possession or enjoyment at or after death. See *Helvering* v. *Tyler supra; Old Colony Trust Co.* v. *Commissioner, supra; Kernochan* v. *United States*, 29 F. Supp. 860; *Guaranty Trust Co.* v. *Commissioner, supra;* compare, *Gaither* v. *Miles*, 268 Fed. 692; Comment, 38 Mich. L. Rev. 526; Comment, 32 Ill. L. Rev. 223.

The judgment of the Circuit Court of Appeals is reversed.

The CHIEF Justice and Mr. Justice ROBERTS think the judgment should be affirmed for the reasons stated in the opinion of the Circuit Court of Appeals.